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IN THE

Supreme Court of the United States

[illegible]

No. 75

COUNTY OF SANTA BARBARA, a public corporation of the State of California; THE CITY OF SANTA BARBARA, a municipal corporation of the State of California; [illegible]

v.

ROBERT J. MALLERY, Los Angeles District Engineer, Corps of Engineers; WALTER J. HICKEL, Secretary of the Interior, [illegible]

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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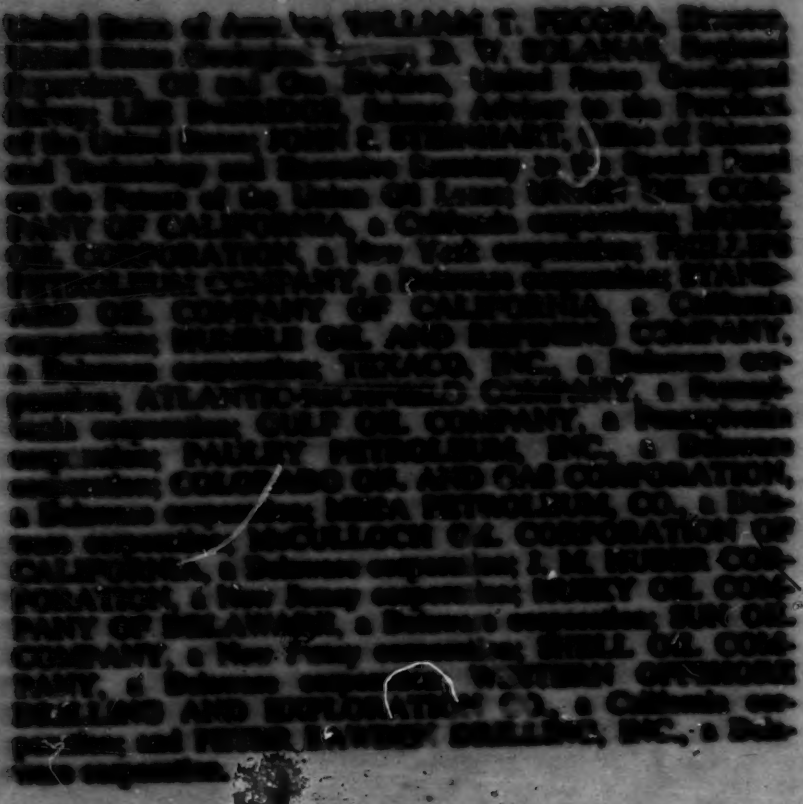

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IN THE

Supreme Court of the United States

October Term, 1970

No. .....

COUNTY OF SANTA BARBARA, a political subdivision of the State of California; THE CITY OF SANTA BARBARA, a municipal corporation of the State of California; ALVIN WEINGAND; JACK D. KISCH; REYNOLDS YATER; JINNIE HUGLIN; NORMAN SANDERS; MARGARET D. GREENWALD; ARTHUR DAYTON; LEWIS MOTTER SMITH; MRS. GEORGE SIDENBERG, JR.; MRS. KENNETH PECK; ROBERT O. EASTON; CHARLES M. CAMPBELL, JR.; KENNETH MILLAR; WILLIAM URE; JAMES BOTTOMS; FRED EISSLER; NORMAN S. NYCE; MRS. H. R. BENHAM, JR.,

Petitioners,

vs.

ROBERT J. MALLEY, Los Angeles District Engineer, Corps of Engineers; WALTER J. HICKEL, Secretary of the Interior, United States of America; WILLIAM T. PECORA, Director, United States Geological Survey; D. W. SOLANAS, Regional Supervisor, Oil and Gas Division, United States Geological Survey; LEE DuBRIDGE, Science Advisor to the President of the United States; JOHN S. STEINHART, Office of Science and Technology and Executive Secretary to the Special Panel on the Future of the Union Oil Lease; UNION OIL COMPANY OF CALIFORNIA, a California corporation; MOBIL OIL CORPORATION, a New York corporation; PHILLIPS PETROLEUM COMPANY, a Delaware corporation; STANDARD OIL COMPANY OF CALIFORNIA, a California corporation; HUMBLE OIL AND REFINING COMPANY, a Delaware corporation; TEXACO, INC., a Delaware corporation; ATLANTIC-RICHFIELD COMPANY, a Pennsylvania corporation; GULF OIL COMPANY, a Pennsylvania corporation; PAULEY PETROLEUM, INC., a Delaware corporation; COLORADO OIL AND GAS CORPORATION, a Delaware corporation; MESA PETROLEUM, CO., a Delaware corporation; McCULLOCH OIL CORPORATION OF CALIFORNIA, a Delaware corporation; J. M. HUBER CORPORATION, a New Jersey corporation; HUSKY OIL COMPANY OF DELAWARE, a Delaware corporation; SUN OIL COMPANY, a New Jersey corporation; SHELL OIL COMPANY, a Delaware corporation; WESTERN OFFSHORE DRILLING AND EXPLORATION CO., a California corporation; and PETER BAWDEN DRILLING, INC., a Delaware corporation.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners[1] pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit affirming judgments of the United States District Court, Central District of California, denying motions for preliminary injunctions. The preliminary injunctions, if granted would have, in the "Hickel" cases, restrained the defendants Secretary of the Interior and Director of the United States Geological Survey from allowing new exploration or development in the Santa Barbara Channel off the Coast of California following the oil well blowout of January, 1969, without holding a public hearing thereon accompanied by access to the plaintiffs and the public of the data upon which the defendants acted or intend to act in connection with and since said oil spill. As to the defendant Malley, the preliminary injunction if granted, would have restrained him, the District Engineer of the Corps of Engineers, from granting any permits with respect to new structures or obstructions without first according hearings.

Opinions Below.

There is no written opinion by the trial court. The opinion of the court below in the "Hickel" cases is reported at 426 F. 2d 164, and in the *Malley* case, at 426 F. 2d 171. Copies of these opinions are set out in the appendix hereto.

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[1]Pursuant to Rule 25(5) of this Court, this is a single petition for writ of certiorari in three cases (*County of Santa Barbara v. Malley*, No. 25049; *County of Santa Barbara v. Hickel*, No. 25413 and *Weingand v. Hickel*, No. 25414, in the Ninth Circuit Court of Appeals). The three cases all involve "identical or closely related questions", and were heard on the same record and at the same time by the lower court. In certifying the record to this Court (prior to the July 1, 1970 change in the Rules which obviated that requirement) the Clerk of the Court of Appeals did so as a single record in all three cases under a title similar to the one set out by petitioners here.

In the *Malley* case, because, upon the District Court's denial of the preliminary injunction, one of the defendant oil companies began moving a huge platform, "Hillhouse", from Vancouver, Washington to the Santa Barbara Channel for installation, petitioners sought relief in this Court pending appeal and also sought a Rule 20 writ of certiorari. Those applications were denied. No opinions were written. The action of this Court is reported at 396 U.S. 950. The subsequent appeal to the Court of Appeals and the present petition did not and does not involve the matters as to which the mentioned temporary relief had heretofore been sought in this Court. The appeal and this petition involve future action and do not seek to undo the past. At the time relief as to "Hillhouse" was sought in this Court, representations were made to this Court by the defendants that the case ought to be permitted to pursue its normal (although expedited) course on the merits through the Court of Appeals. That course has been pursued. This petition seeks review thereof.

Jurisdiction.

1. The date of the judgments sought to be reviewed and the time of their entry is April 21, 1970.

2. No rehearing was sought in the Court of Appeals. Extension of time within which to file this petition for writ of certiorari to and including September 18, 1970, was granted by Mr. Chief Justice Burger on July 22, 1970.

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. 1254(1).

Questions Presented for Review.

1. As to the *Malley* case: Under the circumstances extant in the Santa Barbara Channel following the oil well blowout of January, 1969, do the regulations of the Corps of Engineers require that a public hearing be held before the District Engineer issues a permit allowing new structures or obstructions in the Channel? If they do not, are plaintiffs entitled, as a matter of due process, to such a public hearing prior to the permit being issued?

2. As to the *Hickel* cases: Under the circumstances extant in the Santa Barbara Channel following the oil well blowout therein in January, 1969, constitutionally construed to accord due process and equal protection, do the regulations of the Department of the Interior require that a public hearing be held, with public access to the data upon which they have acted and intend to act, before the Secretary of the Interior or the Director of the United States Geological Survey make their decision as to further new and significant oil exploitation in the channel.[2]

3. Should costs on appeal be allowed in a suit brought on behalf of the public to protect the environ-

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[2]The wording of plaintiffs' motion for injunction *pendente lite* in the District Court lends itself to an interpretation that plaintiffs were seeking much broader relief. Petitioners tried to make it clear in the Court of Appeals, and they do so here, that they do not contend they are entitled to a hearing each time the oil companies are ordered to turn or not to turn, a screw. They do contend, however, that in the light of the major decisions the Secretary is required to make regarding the Channel in the aftermath of the blow-out, as to such, they are entitled to a hearing.

ment from pollution caused by commercial exploitation of the public's natural resources? Subsidiary to that question, if some costs are allowable, ought not the amount be reduced when the briefs are unnecessarily printed and unnecessarily include as printed appendices, the entire Outer Continental Shelf Lands Act, extensive Regulations, as well as Findings and Orders of the trial court and a sample lease, the latter two of which were in the duplicated record before the Court?

Constitutional Provision and Statute Involved.

The due process clause of the Fifth Amendment, 33 C.F.R. 209.120(g), pertinent portions of the Outer Continental Shelf Lands Act (67 Stat. 462; 43 U.S.C. 1331, *et seq.*) and of 30 C.F.R. Part 250 and 43 C.F.R. Part 3380, are set out in the Appendix.

Statement of the Case.

Basis for Federal Jurisdiction in the Court of First Instance.

The District Court had jurisdiction under Section 4 of the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1333(b) and under 28 U.S.C. 1331 and 1361.

Facts.

In one of the *Hickel* cases (*County v. Hickel*, No. 25413 in the court below) the plaintiffs are the City and the County of Santa Barbara, the local governmental bodies on the Santa Barbara Channel on the coast of California whose property and that of the inhabitants therein, was affected by the 1969 oil spill. The defendants in that action are the Secretary of the

Interior, the Director of the United States Geological Survey, a part of the Department of the Interior responsible for the operations on the Outer Continental shelf, the regional supervisor of the Geological Survey, and most of the oil companies which have leases in the outer continental shelf in the Channel.

In the other *Hickel* case (*Weingand v. Hickel*, No. 25414 in the court below), the plaintiffs are private citizen property owners along the coast, boat owners, businessmen, and members of the public, all of whom were variously damaged by the oil spill. The plaintiffs also include officials of conservation organizations.[8] The defendants in the private citizen-members of the public case are the same governmental officers as in the *County v. Hickel* case, plus those persons who participated in the DuBridge Panel Report which recommended certain actions in the Channel following the blowout, and the four oil companies jointly interested in Platform "A", from which was drilled the well which blew out.

In the *Malley* case (*County v. Malley*, No. 25049 in the court below), the plaintiffs are all the plaintiffs in the two *Hickel* cases. The defendants are the District Engineer of the Corps of Engineers and all the oil companies which have leases in the Channel.

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[8]Plaintiff Mrs. George Sidenberg, Jr., is President of Get Oil Out! Inc. (GOO); plaintiff Alvin Weingand is the former president of GOO; plaintiff Fred Eissler is the President of Scenic Shoreline Preservation Conference, Inc.; plaintiff Norman Sanders is the President of Santa Barbara Citizens for Environmental Defense.

As indicated in the first paragraph of this petition, plaintiffs sought preliminary relief in the form of hearings and access to data before further exploitation of the Channel, following the blowout, went forward. From the denials, the appeals were taken and that aspect of the cases is here.

In the meantime however, a three-judge court having been appointed in the *Hickel* cases, there is pending before that court plaintiffs' later motions for preliminary injunction and defendants' motions to dismiss.[4] Although not pending before the three-judge court in *Malley* because no effort to enjoin the enforcement, operation or execution of a statute on the ground of repugnancy to the Constitution was made in that case, plaintiffs' motions in *Malley* for a preliminary injunction and defendants' motions to dismiss will, it now appears, be decided at the same time as the motions in *Hickel*, the single judge in *Malley* being one of the three judges in *Hickel*.

As is clear, plaintiffs have thus far been unsuccessful in their efforts to obtain a public hearing, and oil exploitation on the outer continental shelf in the Santa Barbara Channel is going forward with various permits being granted the oil companies by the public officials although some applications are presently pending.

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[4]The three-judge court denied plaintiffs' motions for summary judgment.

Plaintiffs sought to have the motions now pending before the District Court heard and disposed of in time so that any appeals to this Court (in *Hickel*) by either side could be filed at the same time as this petition. They have been unable to do so. The date for argument before the three-judge court has not yet been set and the defendants have obtained various extensions of time to file their documents. The latest word as to the time the three-judge court would set is that it might be some time this month.

Because of the pendency of related phases of these cases before the District Court, upon determination of which it is expected appeal will be taken to this Court by either side we have not here set out detailed facts and, as we shall explain in a moment, we request that this petition not be passed upon until the rest of the cases get to this Court.

Over the objections of plaintiffs, the court below awarded costs to the oil companies amounting to almost $4,500.00. As appears from Question 3, above, petitioners' objections are on the ground that in this kind of a case costs ought not be awarded at all, or if they are, that unnecessary printing costs should not be allowed.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

This Court has never decided whether there exists a right to a public hearing and whether that right is of constitutional dimension when at issue before an administrative agency is the public right to a decent environment—an environment free from unreasonable pollution. This petition for writ of certiorari brings that issue to this Court.

Although the Court of Appeals for the Ninth Circuit in these cases refused to view the public's right to a hearing as entitled to judicial protection, other courts of appeal, including that of the District of Columbia in a pioneer opinion (*Office of Communications*, etc., cited in the next paragraph) by (then) Judge Burger, hospitably viewed that right and held it worthy of protection by the courts.

The manifest importance of this Court determining whether in a large public issue such as this, a public hearing should be held, either as a matter of statutory construction, or because it is constitutionally required, cannot be gainsaid. (*Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F. 2d 608, 612, 620 [CA 2 1965], *cert. den.* 384 U.S. 941; *Office of Communications of United Church of Christ v. Federal Communications Commission*, 359 F. 2d 994, 1004 [CA DC 1966]; *Michigan Consolidated Gas Co. v. Federal Power Commission*, 283 F. 2d 204, 224 [CA DC 1960]; *D. C. Federation of Civic Associations v. Airis*, 391 F. 2d 478, 484 [CA DC 1968]; *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650 [SD NY 1967]; *Powelton Civic Home Owners Association v. Department of*

Housing & Urban Development, 284 F. Supp. 809 [ED Pa 1968]; see, also, *City of Chicago v. United States*, 396 U.S. 162 [1969]; *Morgan v. United States*, 304 U.S. 1, 14-15 [1938]; *Sniadach v. Family Finance Corporation*, 395 U.S. 337, 339 [1969]; *Thorpe v. Housing Authority of Durham*, 393 U.S. 337, 339 [1969]; *Silver v. N. Y. Stock Exchange*, 373 U.S. 341 [1963]; *Wong Yang Song v. McGrath*, 339 U.S. 33 [1950].)

1. The Malley Case.

In the *Malley* case, the court below erred in holding that properly construed under the circuumstances of this case, the current[5] regulations do not require a hearing. The regulations provide (33 C.F.R. 209.120 [g][1]) that "[i]t is the policy of the Chief of Engineers to conduct his civil works program in an atmosphere of public understanding, trust and mutual cooperation, and in a manner responsive to public needs and desires. To this end, public hearings are helpful and will be held whenever there appears to be sufficient public interest to justify such action. In case of doubt a public hearing should be held." The regulations (33 C.F.R. 209.120[g][2]) also cite "general public opposition", "Congressional or responsible local authorities" requesting it, as among the instances warranting public hearings.

These conditions of the regulations were abundantly met here. Indeed, plaintiffs here are the local city and county themselves. Senatorial request was made and that there is general public opposition to the issuance of the permits is to put it mildly. Although the regula-

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[5]While the case was pending on appeal, the regulations of the Corps of Engineers were amended.

tions (33 C.F.R. 209.120[g] [3]) do restrict the hearings to matters of navigation and national security[6] the record is that plaintiffs were prepared to show by calling experts just such adverse effect, namely, that applications applied for were in areas straddling sea lanes, that the maneuverability of long vessels was such (taking two or more miles to respond to a change of course) that allowing drilling structures where contemplated would be hazardous; that the more drilling allowed in the Channel, the more danger and likelihood of leakage, leakage which can cause such contamination as to impair free navigation and cause expensive hull and engine damage, particularly to small pleasure craft, not to mention the fact that the January, 1969 spillage required the complete closing of the Santa Barbara Harbor.

Accordingly, plaintiffs are entitled to a hearing.

The rationale of the court below is found in the third from the last paragraph of its opinion. There the court reasoned that plaintiffs were not entitled to hearings because any such (1) would be concerned only with navigation and national security; (2) would pertain to the use of lands controlled by the United States under lease to others; (3) would not purport to adjudicate the property rights of any of the plaintiffs. None of these, we submit, is a valid reason for denying the right to be heard.

One. As pointed out above, plaintiffs did have important and expert factual objections having to do with navigation which the Corps of Engineers should have

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[6]Thus leaving out considerations of environment, a matter dealt with by the National Environmental Policy Act of 1969 (83 Stat. 852; 42 U.S.C. 4371, *et seq.*) and presently before the District Court in the motions now before that court.

heard and which the court below should have required it to hear.

Two. The cases cited by the Court of Appeals in support of its "use of lands controlled by the United States" argument[7] themselves recognize that Congress may provide for procedural protection in dealing with the public lands. This, Congress has done by the passage of the National Environmental Policy Act, *supra*.[8] Accordingly, those cases are not applicable to the facts of this case.

Three. That any hearings by the District Engineer would not adjudicate the property rights of any of the plaintiffs (on the premise that only defense and national security would be involved), is no ground for denying them the right to be heard. In so viewing the case, the court below has mistakenly disregarded the rights of the public in such matters and its right to be heard. *Cf.* (then) Judge Burger in *Office of Communications to United Church of Christ v. F.C.C., supra,* 359 F. 2d 994 (CA DC 1966) and the "environmental" cases cited hereinabove, page 9.

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[7] *Alabama v. Texas,* 347 U.S. 272, 273 (1954); *United States v. California,* 332 U.S. 19, 27 (1947); *United States v. San Francisco,* 310 U.S. 16, 29-30 (1940).

[8] The applicability and effect of that Act are matters now before the District Court. While this Court could pass on the present appeals in the light of the new and changed law since the case was presented to the District Court (*Douglas v. City of Jeannette,* 319 U.S. 157, 165 [1943]) *Ziffrin v. United States,* 318 U.S. 73, 78 [1943]; *Thorpe v. Housing Authority,* 393 U.S. 268, 281 [1969]), we suggest it would be more appropriate and efficient for this Court to consider the effect of the Environmental Policy Act after the three-judge District Court passes upon the question and thus this Court will have the benefit of that court's views. For this reason we are suggesting that this Court not pass upon this petition for writ of certiorari until after the District Court has had opportunity to consider the matter.

2. The Hickel Cases.

As to the *Hickel* cases, the court below erroneously ruled that the question of the Constitutional right to a hearing under the regulations was[9] for the three-judge court.[9] We contend that constitutionally and properly construed, the regulations provide for hearings and that the Court of Appeals erred in not passing on the question. The Court below cited no cases in support of its ruling that it had no jurisdiction. Frankly, we concede that the matter is not clear and that the decisions of this Court are not dispositive.

In the District Court we said that the three-judge court should pass upon the issue and hear the motions for injunction *pendente lite*, but the District Court ruled the other way and agreed with the Government and the oil companies that the single judge should hear the motions.[10] As to this issue, if the three-judge court now takes jurisdiction and determines the constitutionality of the regulations, vis-a-vis whether they do, or are required to, afford hearings, that ruling of that court, whichever way it goes, may well have a significant effect on this phase of this petition.

Whether hearings are constitutionally required is best determined by this Court after it has the views of the lower courts. These, this Court does not yet have. It

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[9]The Court below said (Appx. p. 17): "[A]ll aspects of this contitutional question (that the failure to grant plaintiffs a hearing and prior access to data deprives them of due process of law) have heretofore been assigned to the three-judge court. . . . and we are therefore without jurisdiction to consider that issue."

[10]On the motions for preliminary injunction now pending before the District Court the Government has receded and now agrees that it is proper for the three-judge court to consider the motions.

does not have the views of the Court of Appeals. That court expressly declined to pass on the issue. It should have the views of the three-judge court. True, at this point, no one knows what the three-judge court will do. When it acts, we will request leave of Court to file an appropriate supplemental petition herein.

3. Costs Should Not Have Been Awarded.

The awarding of costs is not mandatory (Rule 39 [a], F.R. App. Proc.). They should not have been allowed in the instant cases.

The parties aggrieved in a suit of this nature are the public. A large judgment of costs against citizens who thus undertake to protect the public welfare can have none but a chilling effect on efforts, as here, to seek to judicially protect the right to a decent environment. The citizen has difficulty enough combating the Government and the huge commercial interests whose conduct is involved. He ought not be saddled with such adversaries' costs.

It is true that among the plaintiffs in these cases are the City and the County of Santa Barbara and that such entities can "afford" to pay the costs here taxed. But here, again, these entities are acting as trustee to protect the public. To be required to pay heavy costs will, as to them likewise, put a damper on and discourage this worthwhile public effort.

In any event, the court below should have reduced the amount of costs awarded. The oil companies printed their briefs. They need not have. The Rules permit duplicated or other copying process briefs to be filed (Rule 28[g], F.R. App. Proc.). The Government here did not find it necessary to print, but

filed duplicated briefs[11] This is not to say that if the oil companies wanted to print their briefs, they should not be permitted to do so, but there is no warrant for requiring the plaintiffs to pay for that extra expense.

Moreover, the brief of some of the appellants printed as an appendix the entire Outer Continental Shelf Lands Act (23 pages) and some 50 pages of Regulations. This was unnecessary. The Rules (Rule 28[f] F. R. of App. Proc.) provide that such matter may be supplied the court in pamphlet form. Here, again, if the oil companies desired to print this lengthy material, they could do so, but the plaintiffs ought not be required to pay for this luxury when, as the Rules recognize, a less expensive method is available. Similarly unnecessarily printed as appendices were a sample lease and the findings and orders of the trial court (30 pages), all of which were readily available in the duplicated record which had been prepared for the court.

In the interests of the sound administration of justice, this Court ought to grant certiorari so as to lay down guidelines for the future in such matters.

Conclusion.

In its opinion, the Court below spoke of not wasting judicial resources and unnecessarily confusing issues. Petitioners agree and for this reason are urging that this Court not pass on this petition at this time.

Despite the seeming complexity of the proceedings, one significant theme has been and is urged by plaintiffs throughout: the desire for a *hearing* before the Government makes any significant decision affecting the future, oil-wise, of the Santa Barbara Channel. Up

[11]The Government also did not request costs.

to the present time, this theme has had as its central base the Constitution. Subsequent to the filing of the complaints in these actions, Congress adopted the National Environmental Policy Act of 1969 (83 Stat. 852; 42 U.S.C. 4331, *et seq.*). By virtue of that Act and authoritative executive and administrative interpretation of it, petitioners are entitled to a hearing with respect to future significant Governmental actions in the Channel.[12]

This Court will adjudicate the rights of the parties seeking relief as to the future in the light of legislation enacted after the launching of the litigation. (See cases cited, *supra*, fn. 8). But since the effect of that legislation is presently pending before the District Court, we submit it would be more appropriate for this Court to await the views of the District Court on that issue and then adjudicate the entire case.[13]

Accordingly, the petition for writ of certiorari should be granted after the District Court has had an opportunity to dispose of the motions before it and then

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[12]See Presidential Executive Order No. 11514, Sec. 2(b), (d); 35 F.R. 4247; and Interim Guidelines of the Council on Environmental Quality, § 13, 35 F.R. 7392.

[13]We would prefer to have filed in this Court as to all phases of the cases at the same time. We secured an extension of time to file this petition in an effort to do so. Our application for extension as it explained, was based on the hope that the motions then pending before the three-judge District Court would be disposed of so that appeals from the decisions therein could be before this Court along with this petition. Those decisions have not yet been made and so, because of the time limitations on the filing of a petition for writ of certiorari, we are compelled to file this petition now.

upon the filing of supplemental papers herein, with opportunity, of course, for respondents to reply; and we consent to an extension of time until then for respondents to file their reply to this instant petition.

Respectfully submitted,

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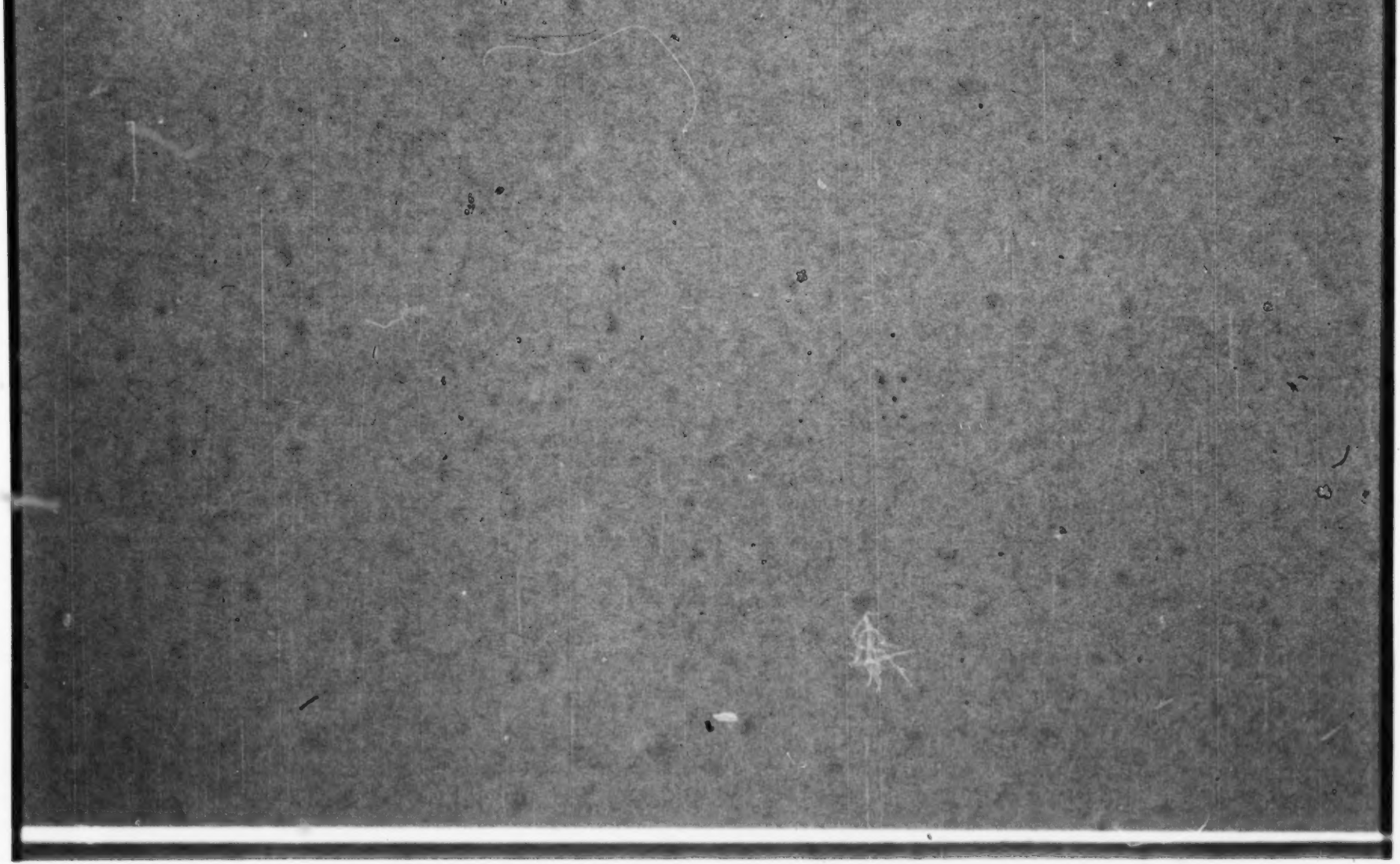

APPENDIX A.

Opinions of the Court of Appeals.

In the United States Court of Appeals, for the Ninth Circuit.

County of Santa Barbara, a political subdivision of the State of California; the City of Santa Barbara, a municipal corporation of the State of California; Alvin Weingand; Jack D. Kisch; Reynolds Yater; Jinnie Huglin; Norman Sanders; Margaret D. Greenwald; Arthur Dayton; Lewis Motter Smith; Mrs. George Sidenberg, Jr.; Mrs. Kenneth Peck; Robert O. Easton; Charles M. Campbell, Jr.; Kenneth Millar; William Ure; James Bottoms; Fred Eissler; Norman S. Nyce; Mrs. H. R. Benham, Jr., Appellants, v. Robert J. Malley, Los Angeles District Engineer, Corps of Engineers; Union Oil Company of California, a California corporation; Mobile Oil Corporation, a New York corporation; Phillips Petroleum Company, a Delaware corporation; Standard Oil Company of California, a California corporation; Humble Oil and Refining Company, a Delaware corporation; Texaco, Inc., a Delaware corporation; Atlantic-Richfield Company, a Pennsylvania Corporation; Gulf Oil Company, a Pennsylvania corporation; Pauley Petroleum, Inc., a Delaware corporation; Colorado Oil and Gas Corporation, a Delaware corporation; Mesa Petroleum Co., a Delaware corporation; McCulloch Oil Corporation of California, a Delaware corporation; J. M. Huber Corporation, a New Jersey corporation; Husky Oil Company of Delaware, a Delaware corporation; Sun Oil Company, a New Jersey corporation; Shell Oil Company, a Delaware corporation, Appellees. No. 25,049.

Filed: April 21, 1970.

Appeal from the United States District Court, for the Central District of California.

Before: HAMLEY and BROWNING, Circuit Judges, and SMITH, District Judge*

HAMLEY, Circuit Judge:

As in the related *Hickel* cases, Nos. 25413 and 25414, in which an opinion has been filed today, this case is an aftermath of the January, 1969 oilwell blowout under Union Oil Company's Platform A in the Santa Barbara Channel.

In the posture of the case as it reaches this court, the ultimate relief sought by plaintiffs is much more limited than that which they originally asked for in their complaint. They now seek a mandatory injunction pertaining only to the duties of Robert J. Malley, Los Angeles District Engineer, Corps of Engineers (District Engineer), in acting upon applications for permits to construct new facilities on the Outer Continental Shelf. As to these applications plaintiffs now seek a mandatory injunction requiring the District Engineer to grant them a public hearing before acting thereon. Such hearings would be limited, however, to the effect of the facilities upon navigation and national security.[1]

On October 3, 1969, when plaintiffs began this action, they moved for a preliminary injunction restraining the District Engineer from granting any such appli-

*The Honorable Russell E. Smith, United States District Judge for the District of Montana, sitting by designation.

[1]Plaintiffs are now content to have all considerations other than navigation and national security explored in proceedings before the Secretary of the Interior and his agents, a matter dealt with in the *Hickel* cases.

cation during the course of this ligitation without first according plaintiffs a hearing of the kind described above. Judging by statements made by them in their briefs on appeal, the irreparable damage plaintiffs claim they will sustain if a preliminary injunction is not granted is the loss of their right to hearings on any Outer-Continental-Shelf applications the District Engineer may grant during the pendency of the litigation.

The district court denied the motion for a preliminary injunction. It did so on the following grounds: (1) plaintiffs did not show a strong likelihood that they would ultimately prevail on the merits—*i.e.*, that they were entitled to public hearings under the applicable statutes and regulations, and the Constitution; (2) plaintiffs failed to show any substantial injury to any of their interests due to the denial of such hearings; and (3) the non-Government defendants demonstrated a great likelihood of substantial and immediate injury in the event preliminary injunctive relief was granted. Plaintiffs took this appeal from the order denying a preliminary injunction.

As we said in our opinion filed today in the *Hickel* cases, the granting or withholding of a preliminary injunction rests in the sound discretion of the district court, reviewable only for abuse of discretion. Plaintiffs agree that one of the criteria to be applied in passing upon an application for a preliminary injunctio is whether plaintiffs have shown a strong likelihood that they will ultimately prevail on the merits. But plaintiffs deny that they have failed in this regard. They argue that they have made the requisite showing because, under the established facts and law, they

are entitled as of right to an agency hearing before the District Engineer grants new applications for oil facilities on the Outer Continental Shelf in the Santa Barbara Channel.

We agree with the district court that plaintiffs did not show a strong likelihood that they would ultimately prevail on the merits of their right-to-a-hearing claim.

Plaintiffs do not asserrt that any statute contains express language granting them such a right. They argue, however, that the applicable regulations of the Corps of Engineers, Department of the Army, particularly 33 C.F.R. § 209.120(g), require the District Engineer to grant them a hearing before acting upon applications of the kind in question.

We need not decide whether those regulations, as they existed when the motion for a preliminary injunction was denied in December, 1969, entitled plaintiffs to a hearing. Since at this point plaintiffs seek hearings only as to applications not yet acted upon, the right thereto is now governed by revised regulations which became effective on January 3, 1970.

Section 209.120(g) relates specifically to public hearings. As paragraph (g) of section 209.120 existed in December, 1969, it consisted of subparagraphs (1) and (2), pertaining to public hearings in general. As amended effective January 3, 1970, 35 Fed.Reg. 79, 80 (1970), minor changes were made in subparagraphs (1) and (2), part of subparagraph (2) was renumbered (4) and a new subparagraph (3) was added. New subparagraph (3) deals expressly with hearings concerning navigation and national security in connection

with applications for permits authorizing structures on oil leases on the Outer Continental Shelf.[2]

In our opinion, subparagraph (3) of the revised regulation, quoted in the margin, states an exception to the general public hearing requirements set out in subparagraphs (1) and (2). Whatever the provisions of subparagraphs (1) and (2) may provide with regard to hearings in general, subparagraph (3) is controlling insofar as hearings pertaining to the Outer Continental Shelf are concerned. Under that subparagraph public hearings will not normally be held in connection with applications of the kind here in issue. They will be

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[2] 33 C.F.R. § 209.120(g)(1), (2) and (3), as revised in January, 1970, read:

"(g) *Public hearing.* (1) It is the policy of the Chief of Engineers to conduct his civil works program in an atmosphere of public understanding, trust, and mutual cooperation, and in a manner responsive to public needs and desires. To this end, public hearings are helpful and will be held whenever there appears to be sufficient public interest to justify such action. In case of doubt, a public hearing should be held.

"(2) Among the instances warranting public hearings are general public opposition to issuance of a permit for work in navigable waters of the United States. District Engineers will notify the Division Engineers of the need for a hearing, state the proposed arrangements and obtain his concurrence. Public hearings will be held in connection with applications for permits in navigable waters of the United States when Congressional interests or responsible local authorities make an official and valid request therefor and such action will fulfill the above stated policy and objectives.

"(3) Since the Corps of Engineers considers only the effect on navigation and national security, public hearings will not normally be held in connection with applications for permits for artificial islands or fixed structures on Outer Continental Shelf lands under mineral lease from the Department of the Interior which has responsibility for other aspects of the public interest. Public hearings will be held by the Corps of Engineers only when in the District Engineer's judgment opponents have a reasonable complaint based on interference with navigation or on adverse effects on national security." 35 Fed.Reg. 79, 80 (1970).

held "only when in the District Engineer's judgment opponents have a reasonable complaint based on interference with navigation or on adverse effects on national security." 35 Fed.Reg. at 80.

We therefore conclude that plaintiffs are not likely to prevail on the merits in this lawsuit, insofar as they rely upon the administrative regulations as the basis for their asserted right to hearings.

As they did in the district court, plaintiffs also argue on this appeal that the Due Process Clause of the Fifth Amendment guarantees them a public hearing with regard to applications for future permits to construct facilities on mineral leases located on the Outer Continental Shelf.

Since such hearings would be concerned only with navigation and national security, would pertain to the use of lands controlled by the United States under lease to others,[3] and would not purport to adjudicate the property rights of any of the plaintiffs, we think there is little likelihood that plaintiffs can establish a constitutional right to them. If they mean to assert that the applicable statutes are unconstitutional because they do not expressly provide for hearings as a matter of right, they must, since they seek an injunction, take that question to a three-judge court convened under 28 U.S.C. §§ 2282 and 2284.

For the reasons stated above it is our opinion that the district court did not abuse its discretion in denying the motion for a preliminary injunction.

Affirmed.

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[3]*See Alabama v. Texas*, 347 U.S. 272, 273 (1954); *United States v. California*, 332 U.S. 19, 27 (1947); *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940).

In the United States Court of Appeals, for the Ninth Circuit.

County of Santa Barbara, a political subdivision of the State of California, and The City of Santa Barbara, a municipal corporation of the State of California, Appellants, v. Walter J. Hickel, Secretary of the Interior, United States of America; William T. Pecora, Director, United States Geological Survey; D. W. Solanas, Regional Supervisor, Oil and Gas Division, United States Geological Survey; Union Oil Company of California, a California corporation; Mobil Oil Corporation; a New York corporation; Phillips Petroleum Company, a Delaware corporation; Standard Oil Company of California, a California corporation; Humble Oil and Refining Company; a Delaware corporation; Texaco, Inc., a Delaware corporation; Atlantic-Richfield Company, a Pennsylvania corporation; Gulf Oil Company, a Pennsylvania corporation; Pauley Petroleum, Inc., a Delaware corporation; Colorado Oil and Gas Corporation, a Delaware corporation; Mesa Petroleum Co., a Delaware corporation; McCulloch Oil Corporation of California, a Delaware corporation; J. M. Huber Corporation, a New Jersey corporation; Husky Oil Company of Delaware, a Delaware corporation; Western Offshore Drilling and Exploration Co., a California corporation; and Peter Bawden Drilling, Inc., a Delaware corporation, Appellees. No. 25,413.

Alvin Weingand; Jack D. Kisch; Reynolds Yater; Jinnie Huglin; Norman Sanders; Margaret D. Greenwald; Arthur Dayton; Lewis Motter Smith; Mrs. George M. Sidenberg, Jr.; Mrs. Kenneth Peck; Robert O. Easton; Charles M. Campbell, Jr.; Kenneth Millar; William Ure; James Bottoms; Fred Eissler; Norman S.

Nyce; Mrs. H. R. Benham, Jr., Appellants, v. Walter J. Hickel, Secretary of the Interior; William T. Pecora, Director, United States Geological Survey; D. W. Solanas, Regional Supervisor, Oil and Gas Division, United States Geological Survey; Lee A. DuBridge, Science Advisor to the President of the United States; John S. Steinhart, Office of Science and Technology and Executive Secretary to the Special Panel on the Future of the Union Oil Lease; Gulf Oil Company; Mobil Oil Corporation; Texaco, Inc.; Union Oil Co., Appellees. No. 25,414.

Filed April 21, 1970.

Appeals from the United States District Court for the Central District of California.

Before: HAMLEY and BROWNING, Circuit Judges, and SMITH, District Judge*

HAMLEY, Circuit Judge:

These cases involve oil drilling and production operations in the Santa Barbara Channel. They are before us on appeals taken by the respective plaintiffs from orders, entered in both cases, denying motions for a preliminary injunction.

We consolidated the cases for briefing and argument with *County of Santa Barbara, et al. v. Malley, et al.*, No. 25,049, in which a separate opinion is being filed today. For convenience we will refer to the three as the *Santa Barbara, Weingand* and *Malley* cases. The two cases dealt with in this opinion (the *Santa Barbara* and *Weingand* cases) will sometimes be referred to collectively as the *Hickel* cases.

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*The Honorable Russell E. Smith, United States District Judge for the District of Montana, sitting by designation.

On April 1, 1968, following competitive bidding, the Secretary of the Interior (Secretary) awarded leases to the non-Government appellees authorizing them to explore for oil, and to construct and operate oil production facilities, on the Outer Continental Shelf in the Santa Barbara Channel. This was done pursuant to authority vested in the Secretary under the Outer Continental Shelf Lands Act (Act), 43 U.S.C. §§ 1331 et seq.

On January 28, 1969, there was an oil well blowout in the Santa Barbara Channel under Platform A, a facility constructed and operated by Union Oil Company under a lease awarded to it in the manner described. On February 7, 1969, the Secretary ordered cessation of all oil drilling and production operations in the Channel. Under direction of the President, the Secretary then appointed a panel of experts, popularly known as the DuBridge Panel, to make recommendations to reduce the then extant oil seepage and to minimize the possibility of future oil spills. On May 27, 1969, the panel issued its recommendations.[1]

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[1]In summary, the DuBridge Panel recommendations, made public on June 2, 1969, were to:

1. Contain and control present oil seepage through the use of underwater receptacles or other suitable methods.
2. Seal off, or reduce as much as possible, the flow from existing seeps through a program of shallow drilling (above the 'C' marker), pumping and grounding.
3. Review the possible earthquake hazards and take necessary actions.
4. Attempt, through an oil withdrawal program, to determine the degree of interconnection between levels of the Repetto formation.
5. Reduce pressures throughout the reservoir to hydrostatic or less and maintain pressures with water injection, if needed, to minimize subsidence.
6. Deplete all Repetto reservoirs as efficiently and rapidly as possible, consistent with safe practices.

In the meantime, on April 4, 1969, plaintiffs in the *Santa Barbara* case filed that action, and on June 4, 1969, they filed an amended complaint. Two claims were asserted. In their first claim plaintiffs alleged that in connection with the awarding of leases, the Secretary had exceeded his statutory authority; and that in the construction and operation of facilities thereunder, some or all of the defendants had been negligent and had engaged in extra-hazardous activities without taking precautions required by such activities. In their second claim plaintiffs asserted that "said Act and the application thereof is [sic] repugnant to the Constitution of the United States . . .," and they requested that the matter be heard before a three-judge court under 28 U.S.C. § 2282.[2]

Accordingly, plaintiffs in the *Santa Barbara* case sought a mandatory injunction which would permanently stop any further offshore drilling operations adjacent to the State of California. They also sought a judicial declaration that the Act is unconstitutional.

Plaintiffs in the *Weingand* case commenced that action on July 10, 1969, and filed an amended complaint on August 11, 1969. Two claims were asserted.

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[2]Plaintiffs alleged that the Act, on its face or as applied, is unconstitutional under the Fifth Amendment because: (1) the Act provides for an unconstitutional delegation of legislative powers to the executive branch of government; (2) the powers granted the Secretary—under the Act—are unlimited, over-broad, vague and without standards with respect to such matters as the commencement, continuance or termination of drilling; and (3) the Act makes no provision for hearing procedures nor for the right of redress or compensation to persons adversely affected or deprived of private property upon the application and enforcement of the Act. Plaintiffs also alleged that the Act violated their "fundamental right to retain and enjoy the esthetic beauty of natural resources reasonably free of obstruction and pollution . . .," as guaranteed by the Ninth Amendment.

In their first claim, plaintiffs alleged that the Government defendants: (1) had refused to make available to plaintiffs and others the data upon which the recommendations of the DuBridge Panel were based; and (2) had refused to accord plaintiffs a hearing on whether the DuBridge recommendations should be effectuated. In their second claim, plaintiffs challenged the constitutionality of the Act upon essentially the same grounds relied upon by the plaintiffs in *Santa Barbara*.

Plaintiffs in the *Weingand* case sought: (1) the convening of a three-judge court under 28 U.S.C. §§2282 and 2284 to hear and determine the proceedings; (2) a preliminary, and a permanent, injunction restraining the Secretary from approving the DuBridge report and from effectuating the DuBridge recommendations without first granting plaintiffs and others a public hearing and without giving plaintiffs and others prior access to the DuBridge data; and (3) a preliminary and a permanent injunction restraining the Secretary from the enforcement, operation and execution of the Act on the ground of its repugnance to the Constitution of the United States.

A three-judge court was constituted to hear both the *Santa Barbara* and *Weingand* cases. In both cases plaintiffs moved for summary judgment on the claims challenging the constitutionality of the Act. In both, defendants moved to dismiss the action. The Honorable Albert Lee Stephens, Jr., one of the members of the three-judge court, with the concurrence of all three judges of that court, entered an order providing that only those motions which raise a constitutional question would be heard by the three-judge court, and providing that all other motions not raising a constitutional issue

would be heard by Judge Stephens.[3] In the same order the motions for summary judgment were assigned to the three-judge court for disposition.

The three-judge court heard arguments on the motions for summary judgment on September 23, 1969. On February 10, 1970, the three-judge court, in an unreported order, denied the motions for summary judgment, holding that the Act and regulations "are not repugnant to the Constitution of the United States."

On October 3, 1969, the plaintiffs in the *Malley* case commenced their action. On the same day plaintiffs in all three cases filed a joint motion for a preliminary injunction. The nature of the preliminary injunction sought in the *Malley* case is described in our opinion in that appeal. In the *Hickel* cases, plaintiffs seek to restrain the Government defendants, pending disposition of the litigation, from allowing the drilling of any new wells in the Santa Barbara Channel without first: (1) holding a public hearing and (2) making available to plaintiffs and to the public, a reasonable time in advance of the hearing, the data upon which such defendants have acted or intend to act with regard to the Santa Barbara Channel oil spill.[4]

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[3]Since the parties do not, on these appeals, question this procedure, we express no opinion as to whether the two suits should have been bifurcated in this manner. Later in this opinion, however, we will have something to say concerning the disposition of the motions for a preliminary injunction by a single district judge rather than by the full three-judge court.

[4]By this time the DuBridge recommendations were in the process of implementation. See note 1 above. After such recommendations had been made, the Secretary authorized defendant Union Oil Company to effectuate the recommended priorities. Union began doing so immediately by, among other things, drilling new oil wells.

The district court denied the motion for a preliminary injunction in the *Hickel* cases on February 10, 1970. In so ruling, that court held that: (1) there is no requirement of a hearing under the Constitution or laws of the United States, or applicable rules or regulations, for persons in plaintiffs' position; (2) there is no requirement under the Constitution, laws, or regulations that information such as that which plaintiffs seek be make available to them; and (3) plaintiffs have not shown sufficient need for the extraordinary relief which would be afforded by a preliminary injunction and have failed to show an irreparable injury.[5] These appeals followed.

The granting or withholding of a preliminary injunction rests in the souund discretion of the trial court. *Jones v. Board of Regents,* 397 F.2d 259 (9th Cir. 1968). Our function on these appeals is therefore to determine whether, in denying a preliminary injunction, the district court abused its discretion.

A showing that the plaintiffs will otherwise suffer irreparable injury is an essential prerequisite to a preliminary injunction. *Kontes Glass Company v. Lab Glass, Inc.,* 373 F.2d 319, 320 (3rd Cir. 1967). Clearly, plaintiffs have not shown that, unless a preliminary injunction is issued granting them a hearing before the Government defendants allow the drilling of new

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[5]The district court also thought that the circumstances were such that the court should not restrict the Secretary's freedom of action in dealing with the urgent problem of oil spillage, finding:

> "The Secretary of the Interior may have necessity for making decisions in sequence upon the matter which is the subject of the above entitled action, which would be hampered by preliminary injunctive relief.
>
> "A preliminary injunction granted herein, as requested by plaintiffs, might very well inhibit the decision making which would be necessary for the protection of the public and for prevention of another such incident."

wells in the Santa Barbara Channel, there will be another blowout or other physical damage of an irreparable nature. But they argue that they have a right to an agency hearing before additional oil drilling is allowed, and if they are not granted such a hearing pending disposition of the litigation, the right to such hearing will, as to any well drilled in the meantime, be lost forever. This is the irreparable damage which, plaintiffs assert, should have been, but was not, recognized by the district court.

Thus, while the merits of the litigation are not ordinarily to be decided in passing upon a motion for a preliminary injunction, plaintiffs have here so related their irreparable damage contention to their asserted right to a hearing that a consideration of the merits cannot be avoided.

We turn, then, to plaintiffs' claimed right to an agency hearing before the non-Government defendants are allowed to drill new wells on the Outer Continental Shelf. Plaintiffs do not contend that the Act contains any express language requiring the Secretary of the Interior or any of his representatives to afford plaintiffs a hearing or to make available the desired data. They contend, instead, that they are entitled to such a hearing, and to the data, because the applicable regulations provide for such a hearing, and because the failure to grant a hearing would deprive plaintiffs of due process of law.[6]

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[6]Plaintiffs also claim that they are entitled to a hearing as a matter of equal protection of the law under the Act and the regulations promulgated by the Secretary. According to their reasoning, the Act and the regulations "provide ample due process to the oil company lessees but not the plaintiff or the public. . . ." because they provide lessees with repeated opportunities for hearings on matters affecting the lessees' interests but make

The regulations of the Secretary pertaining to oil and gas operations in the Outer Continental Shelf appear in 30 C.F.R. §§ 250.1 et seq. (Part 250) and 43 C.F.R. §§ 3380.0 et seq. (Part 3380).

Plaintiffs rely upon several sections of Part 250, as noted in the margin.[7] These regulations were amended in August, 1969. 34 Fed.Reg. 13544 (1969). We will distinguish between the revised and the superseded regulations by use of the term "new" and "old."

Both the old and the new regulations contained in Part 250 spell out in considerable detail the factors which the Secretary and his agents are to bear in mind in performing their duties under the Act. These factors include the protection and conservation of natural resources, maximum economic recovery of mineral resources compatible with sound conservation practices, protection of wildlife and aquatic life, protection of human health, safety, property, and the environment, abatement of damage or waste, and avoidance of pollution of the waters of the high seas. *E.g.*, 30 C.F.R. §§ 250.1 (old and new), 250.11 (old and new), and 250.12 (old and new).

The only provision of the old Part 250 regulations which made any mention of a hearing was section 250.11. This section provided that, "After appropriate hearings," the supervisor (a representative of the Secretary) may establish field rules to govern the development and method of production of a pool, field, or area.

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no similar provision for the plaintiffs or for the general public. However, since plaintiffs challenge the actions of a federal official in this suit, this line of argument, although labelled an equal protection attack, amounts to a claim of deprivation of due process *Cf. Bolling v. Sharpe*, 347 U.S. 497 (1954).

[7] 30 C.F.R. §§250.1, .11, .12, .16, .17, .30, .36, .42, .43, .46, .81, and .82.

Old section 250.11 did not provide for the kind of hearing plaintiffs seek, for they have not asked to be heard with reference to the establishment of "field rules." Furthermore, new section 250.11, as revised in August, 1969, which controls this suit (*Thorpe v. Housing Authority*, 393 U.S. 268, 281-282 (1969)), eliminates even that provision for a hearing. In its place, new section 250.11 provides that, prior to the issuance of orders and rules, the supervisor "may consult with, and receive comments from, lessees, operators, and other interested parties." 34 Fed.Reg. 13544 (1969). Granting that plaintiffs are "interested parties" in the context of these cases, their right under new section 250.11 to make known their views does not now expressly encompass hearings.[8] There is no other provision of the Part 250 regulations which provides for hearings.

With regard to Part 3380, plaintiffs primarily rely upon section 3381.4, as recently revised. 34 Fed.Reg. 13549 (1969). This section pertains to the selection of tracts for leasing on the Outer Continental Shelf. It provides that, prior to the selection of tracts for leasing, the Director (a representative of the Secretary) shall evaluate fully the potential effect of the leasing program "on the total environment, aquatic resources, aesthetics, recreation, and other resources in the entire area during exploration, development and opera-

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[8]This is not to say that the supervisor, or a higher official in the hierarchy of the Department of the Interior, may not call for a hearing, or that such a hearing ought not to be granted under circumstances of the kind involved in this litigation. Absent emergency considerations such as suggested in the findings of fact of the district court, it would appear to be a salutary practice for the appropriate officials to adopt a liberal attitude towards the granting of hearings in matters of such public importance as are involved in this case.

tional phases." *Id.* The section further provides that, to aid him in his evaluation and determinations, the Director "shall request and consider" the views and recommendations of appropriate federal agencies, and "may hold public hearings after appropriate notice, and may consult with State agencies, organizations, industries and individuals." *Id.*

It will be noted that this regulation pertains to the selection of tracts for leasing, and not to the allowing of drilling of new wells at particular locations, which is the limited sphere of activity plaintiffs seek to affect by their motion for a preliminary injunction. Moreover, the provision of new section 3381.4 with regard to hearings does not speak in mandatory terms but merely authorizes the Director to hold public hearings if he wishes to do so.

This leaves for discussion plaintiffs' argument that the failure to grant them a hearing and prior access to the described data deprives them of due process of law. The Act does not expressly grant the right of public hearings, as plaintiffs concede. They are arguing, in effect, that the constitutionality of the Act can only be saved by reading into the statute the requirement that hearings be held.

But all aspects of this contitutional question have heretofore been assigned to the three-judge court in the *Santa Barbara* case and we are therefore without jurisdiction to consider that issue. In their second claim in the *Santa Barbara* case, which was assigned to the three-judge court, plaintiffs alleged that the Act or "the application thereof" is repugnant to the Constitution. One reason stated in this claim why the Act is uncon-

stitutional is that "the Act and the actions of the Secretary of the Interior make no provision for hearing procedures. . . ." For this reason, and others, plaintiffs sought a mandatory injunction permanently restraining defendants from any activities involving offshore oil drilling operations of any nature adjacent to the shore of the State of California.

In their second claim in the *Weingand* case, plaintiffs purport to limit their grievance to the asserted unconstitutionality of the Act "on its face." If plaintiffs thereby intended to deprive the three-judge court of jurisdiction to determine whether the Act, as applied, is unconstitutional, we question whether they may do so. Title 28, section 2282, provides that when an injunction is sought to restrain the "enforcement, operation or execution of any Act of Congress for repugnance to the Constitution," the application is to be heard and determined by a district court of three judges. The quoted language does not seem to be limited to questions concerning the constitutionality of a federal statute "on its face."

Moreover there would be an obvious waste of judicial resources, and an unnecessary confusion of issues, if plaintiffs were permitted to pursue part of their constitutional attack in the three-judge court, with appeal to the Supreme Court, and part in the single district court, with appeal to this court. Finally, however successful plaintiffs may have been in bifurcating the constitutional issue in the *Weingand* case, they have, as noted above, submitted the whole constitutional problem to the three-judge court in the *Santa Barbara* case.

Inasmuch as the motions for a preliminary injunction in the *Hickel* cases raised constitutional questions, it is doubtful whether the single district judge, as distinguished from the three-judge court, should have dealt with any phase of those motions. See 28 U.S.C. § 2284(3)-(5). But since the single district judge determined to deal with them, and this course has not been questioned by any of the parties, his subject-matter jurisdiction was at least limited to non-Constitutional issues.

Since, as to all aspects of the *Hickel* cases which are properly before this court, plaintiffs have failed to establish a right to an agency hearing before additional oil drilling on the Outer Continental Shelf is allowed, the failure to grant such a hearing does not amount to an irreparable damage which could be avoided by granting the requested preliminary injunction. Accordingly, the district court did not abuse its discretion in denying, on the non-Constitutional grounds, the motion for a preliminary injunction.

Affirmed.

APPENDIX B.

Fifth Amendment to the United States Constitution.

"No person shall . . . be deprived of life, liberty or property, without due process of law . . ."

APPENDIX C.

33 Code of Federal Regulations § 209.120(g)(1), (2) and (3).

"(g) *Public hearing.* (1) It is the policy of the Chief of Engineers to conduct his civil works program in an atmosphere of public understanding, trust, and mutual cooperation, and in a manner responsive to public needs and desires. To this end, public hearings are helpful and will be held whenever there appears to be sufficient public interest to justify such action. In case of doubt, a public hearing should be held.

"(2) Among the instances warranting public hearings are general public opposition to issuance of a permit for work in navigable waters of the United States. District Engineers will notify the Division Engineers of the need for a hearing, state the proposed arrangements and obtain his concurrence. Public hearings will be held in connection with applications for permits in navigable waters of the United States when Congressional interests or responsible local authorities make an official and valid request therefor and such action will fulfill the above stated policy and objectives.

"(3) Since the Corps of Engineers considers only the effect on navigation and national security, public hearings will not normally be held in connection with applications for permits for artificial islands or fixed structures on Outer Continental Shelf lands under mineral lease from the Department of the Interior which has responsibility for other aspects of the public interest. Public hearings will be held by the Corps of Engineers only when in the District Engineer's judgment opponents have a reasonable complaint based on interference with navigation or on adverse effects on national security." 35 Fed.Reg. 79, 80 (1970).

APPENDIX D.

Pertinent Portions of the Outer Continental Shelf Lands Act (67 Stat. 462; 43 U.S.C. 1331 et seq.).

§1332. Congressional declaration of policy; jurisdiction; construction

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.

(b) This subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected.

§1333. Laws and regulations governing lands—Constitution and United States laws; laws of adjacent States; publication of projected States lines; restriction on State taxation and jurisdiction

(a) (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

Jurisdiction of United States District Courts

(b) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such

case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent State nearest the place where the cause of action arose.

Prevention of Obstruction to Navigation by Secretary of the Army

(f) The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to artificial islands and fixed structures located on the outer Continental Shelf.

Provisions as Non-Exclusive

(g) The specific application by this section of certain provisions of law to the subsoil and seabed of the outer Continental Shelf and the artificial islands and fixed structures referred to in subsection (a) of this section or to acts or offenses occurring or committed thereon shall not give rise to any inference that the application to such islands and structures, acts, or offenses of any other provision of law is not intended.

§1334. Administration of leasing—Rules and regulations; amendment; cooperation with State agencies; violations and penalties; compliance with regulations as condition of lease

(a)(1) The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and foregoing provisions of this section, the ruless and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural

resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of conservation laws, rules, and regulations the Secretary is authorized to cooperate with the conservation agencies of the adjacent States. Without limiting the generality of the regulations prescribed by the Secretary thereunder may provide for the assignment or relinquishment of leases, for the sale of royalty oil and gas accruing or reserved to the United States at not less than market value, and, in the interest of conservation, for unitization, pooling, drilling agreements, suspension of operations or production, reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil or gas in any of said submerged lands, and drilling or other easements necessary for operations or production.

(2) Any person who knowingly and willfully violates any rule or regulation prescribed by the Secretary for the prevention of waste, the conservation of the natural resources, or the protection of correlative rights shall be deemed guilty of a misdemeanor and punishable by a fine be deemed guilty of a misdemeanor and punishable by a fine of not more than $2,000 or by imprisonment for not more than six months, or by both such fine and imprisonment, and each day of violation shall be deemed to be a separate offense. The issuance and continuance in effect of any lease, or of any extension, renewal, or replacement of any lease under the provisions of this subchapter shall be conditioned upon compliance with the regulations issued

under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or with the regulations issued under the provisions of section 1335(b)(2) of this title if the lease is maintained under the provisions of section 1335 of this title.

Cancellation of Lease; Judicial Review

(b)(1) Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or of the regulations issued under the provisions of section 1335(b)(2) of this title, if the lease is maintained under the provisions of section 1335 of this title, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in section 1337(j) of this title, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

(2) Whenever the owner of any producing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or of the regulations issued under the provisions of section 1335(b)(2) of this title, if the lease is maintained under the provisions of section 1335 of this title, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of section 1333(b) of this title.

Pipeline Rights-of-Way; Forfeiture of Grant

(c) Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this subchapter, may be granted by the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other mineral under such regulations and upon such conditions as to the application therefor and the survey, location and width thereof as may be prescribed by the Secretary, and upon the express condition that such oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from said submerged lands in the vicinity of the pipeline in such proportionate amounts as the Federal Power Commission, in the case of gas, and the Interstate Commerce Commission, in the case of oil, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste. Failure to comply with the provisions of this section or the regulations and conditions prescribed thereunder shall be ground for forfeiture of the grant in an appropriate judicial proceeding instituted by the United States in any United States district court having jurisdiction under the provisions of section 1333(b) of this title.

§ 1337. Grant of leases by Secretary—Oil and gas leases; award to highest bidder; method of bidding

(a) In order to meet the urgent need for further exploration and development of the oil and gas deposits

of the submerged lands of the outer Continental Shelf, the Secretary is authorized to grant to the highest responsible qualified bidder by competitive bidding under regulations promulgated in advance, oil and gas leases on submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of section 1335(a) of this title. The bidding shall be (1) by sealed bids, and (2) at the discretion of the Secretary, on the basis of a cash bonus with a royalty fixed by the Secretary at not less than 12½ per centum in amount or value of the production saved, removed or sold, or on the basis of royalty, but at not less than the per centum above mentioned, with a cash bonus fixed by the Secretary.

Judicial review of cancellation of lease; petition within sixty days

(j) Any person complaining of a cancellation of a lease by the Secretary may have the Secretary's action reviewed in the United States District Court for the District of Columbia by filing a petition for review within sixty days after the Secretary takes such action.

§ 1341. Reservation of lands and rights—Withdrawal of unleased lands by President

(a) The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.

First refusal of mineral purchases

(b) In time of war, or when the President shall so prescribe, the United States shall have the right of first refusal to purchase at the market price all or any portion of any mineral produced from the outer Continental Shelf.

National security clause

(c) All leases issued under this subchapter, and leases, the maintenance and operation of which are authorized under this subchapter, shall contain or be construed to contain a provision whereby authority is vested in the Secretary, upon a recommendation of the Secretary of Defense, during a state of war or national emergency declared by the Congress or the President of the United States after August 7, 1953, to suspend operations under any lease; and all such leases shall contain or be construed to contain provisions for the payment of just compensation to the lessee whose operations are thus suspended.

National defense areas; suspension of operations; extension of leases

(d) The United States reserves and retains the right to designate by and through the Secretary of Defense, with the approval of the President, as areas restricted from exploration and operation that part of the outer Continental Shelf needed for national defense; and so long as such designation remains in effect no exploration or operations may be conducted on any part of the surface of such area except with the concurrence of the Secretary of Defense; and if operations or production under any lease theretofore issued on lands within any such restricted area shall be suspended, any payment of rentals, minimum royalty, and royalty prescribed by such lease likewise shall be suspended during such period of suspension of operation and production, and the term of such lease shall be extended by adding thereto any such suspension period, and the United States shall be liable to the lessee for such compensation as is required to be paid under the Constitution of the United States.

APPENDIX E.

Pertinent Portions of 30 C.F.R. Part 250.

§ 250.1 Purpose and authority.

The Outer Continental Shelf Lands Act enacted on August 7, 1953 (67 Stat. 462), referred to in this part as "the act," authorizes the Secretary of the Interior at any time to prescribe and amend such rules and regulations, to be applicable to all operations conducted under a lease issued or maintained under the provisions of the act, as he determines to be necessary and proper to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein. Subject to the supervisory authority of the Secretary of the Interior, the regulations in this part shall be administered by the Director of the Geological Survey through the Chief, Conservation Division.

§ 250.10 Jurisdiction.

Subject to the supervisory authority of the Secretary and the Director, drilling and production operations, handling and measurement of production, determination and collection of rental and royalty, and, in general, all operations conducted on a lease by or on behalf of a lessee are subject to the regulations in this part, and are under the jurisdiction of the superior for any region as delineated by the Director.

§ 250.11 General functions.

The supervisor is authorized and directed to act upon the requests, applications, and notice submitted under the regulations in this part and to require compliance with applicable laws, the lease terms, applicable regulations, and OCS Orders to the end that all opera-

tions shall be conducted in a manner which will protect the natural resources of the Outer Continental Shelf and result in the maximum economic recovery of the mineral resources in a manner compatible with sound conservation practices. Subject to the approval of the Chief, Conservation Division, Geological Survey, the supervisor may issue OCS Orders implementing the requirements of the regulations of this part when such implementations apply to an entire region or a major portion thereof. The supervisor may issue written or oral orders to govern lease operations. Oral orders shall be confirmed in writing by the supervisor as promptly as possible. The supervisor may issue other orders, and rules to govern the development and method of production of a pool, field, or area. Prior to the issuance of OCS Orders and other orders and rules, the supervisor may consult with, and receive comments from, lessees, operators, and other interested parties. Before permitting operations on the leased land, the supervisor may require evidence that a lease is in good standing, that the lessee is authorized to conduct operations, and that an acceptable bond has been filed.

§ 250.12 Regulation of operations.

(a) *Duties of supervisor.* The supervisor in accordance with the regulations in this part shall inspect and regulate all operations and is authorized to issue OCS Orders and other orders and rules necessary for him to effectively supervise operations and to prevent damage to, or waste of, any natural resource, or injury

to life or property. The supervisor shall receive, and shall, when in his judgment it is necessary, consult with or solicit advice from lessees, field officials of interested Departments and agencies, including the Fish and Wildlife Service, Federal Water Pollution Control Administration, Bureau of Land Management, Coast Guard, Department of Defense, Corps of Engineers, and representatives of State and local governments.

(c) Emergency suspensions. The supervisor is authorized, either in writing or orally with written confirmation, to suspend any operation, including production, which in his judgment threatens immediate, serious, or irreparable harm or damage to life, including aquatic life, to property, to the leased deposits, to other valuable mineral deposits or to the environment. Such emergency suspension shall continue until in his judgment the threat or danger has terminated.

§ 250.81 Appeals.

(a) An appeal from any order issued under authority of the regulations in this part may be filed as set forth in this section. Compliance with any such order shall not be suspended by reason of an appeal having been taken unless such suspension is authorized in writing by the Director or the Secretary (dependent upon the officer with whom the appeal is pending) and then only upon a determination that such suspension will not be detrimental to the lessor or upon the submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.

(b) An appeal to the Director may be taken from any order of the supervisor by filing such appeal with the latter officer within 20 days after service of the order. The appeal shall incorporate or be accompanied by such written showing and argument on the facts and law as the appellant may deem adequate to justify reversal or modification of the order. All statements of fact must be made under oath.

(c) The supervisor shall transmit the appeal and accompanying papers to the Director with a full report and recommendations in the premises, and that official shall review the record and render such a decision in the case as he deems proper.

(d) An appeal from any decision of the Director may be taken to the Secretary within 30 days after service of the Director's Decision. The appeal shall be accompanied by such written showing and argument on the facts and law as appellant may deem adequate to justify reversal or modification of the decision. Any statements of fact not submitted to the Director must be made under oath.

(e) Oral argument in any case pending before the supervisor, the Director, or the Secretary will be allowed on motion in the discretion of such officer and at a time to be fixed by him.

§ 250.82 Judicial review.

Nothing contained in this part shall be construed to prevent any interested party from seeking judicial review as authorized by law.

§ 250.91 Application for permit to drill, deepen, or plug back.

Applications for permits to drill, deepen, or plug back must be filed in triplicate on Form 9-331C. Prior to commencing such operations approval in writing must be received from the supervisor.

§ 250.97 Public inspection of records.

Geological and geophysical interpretations, maps, and data required to be submitted under this part shall not be available for public inspection without the consent of the lessee so long as the lease remains in effect or until such time as the supervisor determines that release of such information is required and necessary for the proper development of the field or area.

APPENDIX F.

Pertinent Portions of 43 C.F.R. Subpart 3380.

§ 3380.0-3 Purpose and authority.

The Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 462; 43 U.S.C. § 1331 et seq.), referred to in this part as "the act", among other things, authorizes the Secretary of the Interior to issue on a competitive basis leases for oil and gas, sulphur, and other minerals in submerged lands of the Outer Continental Shelf, as defined in section 2 of the act. Subject to the supervisory authority of the Secretary, the regulations in this part shall be administered by the Director, Bureau of Land Management, hereinafter referred to in this part as the Director.

§ 3380.0-4 Applicability of public land laws.

The laws and regulations pertaining to the public lands of the United States are not applicable to the submerged lands of the Outer Continental Shelf. Mineral deposits in the submerged lands of the Outer Continental Shelf are subject to disposition only in accordance with the provisions of the act and the regulations promulgated by the Secretary thereunder.

§ 3381.4 Selection of tracts.

The Director, prior to the final selection of tracts for leasing, either selected in his own motion or nominated pursuant to § 3381.3 of this subpart, shall evaluate fully the potential effect of the leasing program on the total environment, aquatic resources, aesthetics, recreation, and other resources in the entire area during exploration, development and operational phases.

To aid him in his evaluation and determinations he shall request and consider the views and recommendations of appropriate Federal agencies, may hold public hearings after appropriate notice, and may consult with state agencies, organizations, industries, and individuals. The Director shall develop special leasing stipulations and conditions when necessary to protect the environment and all other resources, and such special stipulations and conditions shall be contained in the proposed notice of lease offer. The proposed notice of lease offer, together with all views and recommendations received and the Director's findings or actions thereon, shall be submitted to the Secretary for final approval.

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IN THE

Supreme Court of the United States

October Term, 1970
No. 695

ALVIN WEINGAND, *et al.*,

Petitioners,

vs.

WALTER J. HICKEL, *et al.*,

Respondents.

COUNTY OF SANTA BARBARA, *et al.*,

Petitioners,

vs.

WALTER J. HICKEL, *et al.*,

Respondents.

COUNTY OF SANTA BARBARA, *et al.*,

Petitioners,

vs.

ROBERT J. MALLEY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondent in Opposition.

Opinions Below.

The Court of Appeals, Ninth Circuit has determined that the District Court did not abuse its discretion in refusing to issue a preliminary injunction.

Jurisdiction.

Respondent contends that petitioner has not made a sufficient showing of a "substantial and important" question to properly confer jurisdiction on this court, pursuant to U.S. Sup. Ct. Rule 19, 28 U.S.C.A.

Questions Presented for Review.

Although petitioners have attempted to raise certain constitutional issues, at this juncture, the only issues properly before this Court are:

1. Did the United States District Court abuse its discretion in refusing to issue a preliminary injunction in the two "Hickel" cases or in the "Malley" case;[1] and

2. Did the United States Court of Appeals for the Ninth Circuit abuse its discretion in awarding costs to the respondents.

Statement of the Case.

Respondent incorporates herein by reference respondent Humble Oil & Refining Company's statement of the case as the same is set forth in their Brief, save and except for the fact that respondent Texaco Inc. is a defendant in each of the two "Hickel" cases as well as in the "Malley" case.

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[1]For ease of reference in this brief the cases of *County of Santa Barbara v. Hickel*, No. 25413 in the court below and *Weingand v. Hickel*, No. 25414 in the court below, will be collectively referred to as the *"Hickel"* cases and *County of Santa Barbara v. Malley*, No. 25049 in the court below, will be referred to as the *"Malley"* case.

ARGUMENT.

It should be noted that in the "Malley" case, Petitioners are seeking a mandatory injunction requiring Robert J. Malley, District Engineer of the Army Corps of Engineers, to grant Petitioners a public hearing before acting on any application for permits to construct new oil drilling facilities in the Santa Barbara Channel on the Outer Continental Shelf. In the "Hickel" cases Petitioners seek a mandatory injunction requiring Walter J. Hickel, the Secretary of the Interior, to hold public hearings and to make available to the general public certain data collected by his department. It is well established that certain criteria must be met before a court will issue a preliminary injunction in any event. However, when the relief sought is of a mandatory nature these criteria become stricter and they must be even more strictly followed.

See *e.g.*

Automatic Radio Manufacturing Co. v. Ford Motor Co., (C.A. 1st Cir., 1968) 390 F. 2d 113).

Petitioners have framed the issue before this Court in their brief wherein it is stated that they ". . . [p]ray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit affirming judgments of the United States District Court, Central District of California, denying motions for preliminary injunctions." [Petition p. 2, lines 1-5].

Petitioners then attempt to raise certain constitutional issues at page 4 of their petition; however, it is submitted that petitioners are foreclosed from so doing because these issues are not properly before this court at this time as they are presently before the three-judge

District Court, convened under 28 U.S.C. §§ 2282 and 2284. Petitioners have both requested and consented to the convening of such three-judge court and they should not now be allowed to circumvent that court through this Petition (See petitioners' second claim for relief in the *County of Santa Barbara, et al. v. Hickel, et al.*, No. 25,413). Even if it were conceded that any constitutional question did present itself in this case, which concession is not made, then such question should properly be resolved by the three-judge court. Until such court has made a determination of the application of the Constitution to the issues presented in this case, this Court should not at this stage of the proceedings have thrust upon it the alleged constitutional issues petitioners are attempting to invoke. *Florida Lime & Avocado Growers, Inc. v. Jacobsen,* (1960) 362 U.S. 73, 80 S. Ct. 568, 4 L. Ed. 2d 568.

Moreover, since this is a writ which purports to review the judgments of two lower courts, the only matter properly reviewable by this court is whether or not those courts in denying the petitioners' motion for a preliminary injunction in the first instance and in affirming that refusal in the second instance have abused their discretion. *United States v. W. T. Grant,* 345 U.S. 629 (1953); *Meccano, Ltd. v. John Wanamaker,* (1920) 235 U.S. 136, 141, 40 S. Ct. 463, 64 L. Ed. 822.

Turning then to the real issues at hand:

1. **Did the United States District Court Abuse Its Discretion in Refusing to Issue a Preliminary Injunction in the Two "Hickel" Cases or in the "Malley" Case?**

The petitioners make no allegations in their brief that the lower courts have in any way abused their dis-

cretion either by denying the motion in the District Court or by affirming such denial in the Court of Appeals. Because of such failure to assert that either of these courts have abused their discretion, the Petition for Writ of Certiorari should be dismissed out of hand with nothing more said.

A court may properly deny a motion for a preliminary injunction upon any one or more of the following grounds:

(a) If the plaintiff fails to show an irreparable injury *Katzenback v. McClung*, (1964) 379 U.S. 294, 85 S.Ct. 377, 13 L. Ed. 2d 290; *Meiselman v. Paramount Film Distribuing Corp.*, (C.A. 4th 1950) 180 F. 2d 94, and *Sims v. Greene*, (C.A. 3rd 1947) 161 F. 2d 87;

(b) If the harm to the defendant, which would result from the issuance of the injunction, exceeds the benefit to the plaintiff, even if the plaintiff is ultimately successful *American Federation of Musicians v. Stein*, (C.C.A. 6th 1954) 213 F. 2d 679, cert. den. 75 S. Ct. 108, 348 U.S. 873, 99 L. Ed. 687;

(c) If by granting the preliminary injunction the court would be awarding the plaintiff the full measure of relief to which he normally would be entitled only in the event he were successful after a trial on the merits *Poe v. Michael Todd Co.*, (D.C.N.Y. 1957) 151 F. Supp. 801;

(d) If the plaintiff fails to prove that the case "clearly" warrants the issuance of a preliminary injunction, or if he fails to show a clear right to such a form of relief *U.S. v. Borden Co.*, (1954) 347 U.S. 514, 74 S. Ct. 703, 98 L.Ed. 903;

(e) If the applicant fails to convince the court "with reasonable certainty" that the applicant will succeed at the trial *Nadya, Inc. v. Majestic Metal Specialties*, (D.C.N.Y. 1954) 127 F. Supp. 467.

The foregoing grounds formed the basis for the District Court's decision to deny petitioner's motion for a preliminary injunction. Each of said grounds is sufficient of itself to uphold the District Court's denials of Petitioner's motions. Thus, it is manifest that the District Court did not abuse its discretion. Moreover, Petitioner has not even made the contention that the District Court abused its discretion in denying the motions for preliminary injunctions. It, therefore, of necessity follows that the petition for writ should be denied.

In addition to the foregoing, respondent Texaco Inc. adopts by reference the excellent and thorough argument made by respondent Humble Oil & Refining Company, *et al.*, in its Brief filed with this court.

2. Did the Court of Appeals Abuse Its Discretion in Awarding Costs to the Respondents?

Rule 39(a) F. R. App. Proc. states that ". . . Costs *shall* be taxed against the appellant. . . ." (Emphasis added.) It would appear that the use of the term "shall" makes the rule mandatory. Hence, the Court of Appeals was required to grant costs to appellees. If the provision is construed as discretionary then the petitioners have failed to show that the Court of Appeals abused its discretion in taxing costs to the petitioner-appellants.

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

WALTER O. SCHELL,

Attorney for Respondent Texaco, Inc. a Delaware Corporation.

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IN THE

Supreme Court of the United States

October Term, 1970
No. 695

ALVIN WEINGAND, JACK D. KISCH, REYNOLDS YATER, JINNIE HUGLIN, NORMAN SANDERS, MARGARET D. GREENWALD, ARTHUR DAYTON, LEWIS MOTTER SMITH, MRS. GEORGE M. SIDENBERG, JR., MRS. KENNETH PECK, ROBERT O. EASTON, CHARLES M. CAMPBELL, JR., KENNETH MILLAR, WILLIAM URE, JAMES BOTTOMS, FRED EISSLER, NORMAN S. NYCE, MRS. H. R. BENHAM, JR.,

Petitioners,

vs.

WALTER J. HICKEL, Secretary of the Interior; WILLIAM T. PECORA, Director United States Geological Survey, D. W. SOLANAS, Regional Supervisor, Oil and Gas Division, United States Geological Survey; LEE A. DUBRIDGE, Science Advisor to the President of the United States; JOHN S. STEINHART, Office of Science and Technology and Executive Secretary to the Special Panel on the Future of the Union Oil Lease; GULF OIL COMPANY; MOBIL OIL CORPORATION; TEXACO INC., UNION OIL CO.,

Respondents.

COUNTY OF SANTA BARBARA, a political subdivision of the State of California, and THE CITY OF SANTA BARBARA, a municipal corporation of the State of California,

Petitioners,

vs.

WALTER J. HICKEL, Secretary of the Interior, United States of America; D. W. SOLANAS, Regional Supervisor, Oil and Gas Division, United States Geological Survey; UNION OIL COMPANY OF CALIFORNIA, a California corporation; PAULEY PETROLEUM, a corporation; MOBIL OIL CORPORATION, a New York corporation; PHILLIPS PETROLEUM COMPANY, a corporation; WESTERN OFFSHORE DRILLING AND EXPLORATION COMPANY, a corporation; STANDARD OIL COMPANY, a corporation; HUMBLE OIL COMPANY, a corporation; PETER BAWDEN DRILLING, INC., a Delaware corporation; GULF OIL COMPANY, a

(Continued on next page)

Pennsylvania corporation; TEXACO INC., a Delaware corporation; and ATLANTIC-RICHFIELD OIL CORPORATION, a corporation;

Respondents.

COUNTY OF SANTA BARBARA, a political subdivision of the State of California, THE CITY OF SANTA BARBARA, a municipal corporation of the State of California; ALVIN WEINGAND; JACK D. KISCH; REYNOLDS YATER; JINNIE HUGLIN; NORMAN SANDERS; MARGARET D. GREENWALD; ARTHUR DAYTON; LEWIS MOTTER SMITH; MRS. GEORGE M. SIDENBERG, JR.; MRS. KENNETH PECK; ROBERT O. EASTON; CHARLES M. CAMPBELL, JR.; KENNETH MILLAR; WILLIAM URE; JAMES BOTTOMS; FRED EISSLER; NORMAN S. NYCE; MRS. H. R. BENHAM, JR.,

Petitioners,

vs.

ROBERT J. MALLEY, Los Angeles District Engineer, Corps of Engineers, UNION OIL COMPANY OF CALIFORNIA, a California corporation; MOBIL OIL CORPORATION, a New York corporation; PHILLIPS PETROLEUM COMPANY, a Delaware corporation; STANDARD OIL COMPANY OF CALIFORNIA, a California corporation; HUMBLE OIL AND REFINING COMPANY, a Delaware corporation; TEXACO, INC., a Delaware corporation; ATLANTIC-RICHFIELD COMPANY, a Pennsylvania corporation; GULF OIL COMPANY, a Pennsylvania corporation; PAULEY PETROLEUM, INC., a Delaware corporation; COLORADO OIL AND GAS CORPORATION, a Delaware corporation; MESA PETROLEUM CO., a Delaware corporation; McCULLOCH OIL CORPORATION OF CALIFORNIA, a Delaware corporation; J. M. HUBER CORPORATION, a New Jersey corporation; HUSKY OIL COMPANY OF DELAWARE, a Delaware corporation; SUN OIL COMPANY, a New Jersey corporation; SHELL OIL COMPANY, a Delaware corporation,

Respondents.

Response of Humble Oil and Refining Company, Shell Oil Company, Atlantic-Richfield Oil Company, Phillips Petroleum Corporation, Standard Oil Company of California, and Sun Oil Company of California to Petition for a Writ of Certiorari.

I.

Questions Presented.

The questions presented by petitioners do not arise in quite the form they state them. The most that can be said is as follows:

(1) Did the District Court abuse its discretion in refusing preliminary injunctions to prevent the development of oil leases issued by the United States, given:

(a) The leases were lawfully issued;

(b) Plaintiffs' claim was that interested parties are entitled to hearings before the Departments of the Interior and Army over whether development should take place; and,

(c) No statute or regulation provided for such hearings?

(2) Are costs on appeal within the discretion of the Appellate Court?

(3) Should action on this petition for certiorari be delayed on the chance that an appeal will come before this Court raising related questions?

II.

Statement of the Case.

(a) The Facts Involved.

The Outer Continental Shelf Lands Act (hereinafter the O.C.S. Act), reciting "an urgent need" for development of the oil and gas deposits of the Outer Continental Shelf of the United States, authorized oil

and gas leases. 43 U.S.C. § 1337. Accordingly, on February 28, 1968, the United States issued leases in the Santa Barbara Channel, collecting upwards of $600 million for the awards. While no statute required that hearings be granted, in fact, the Department of the Interior granted a hearing to local governments before leasing. In addition, there were extensive informal communications between the Federal and local authorities in advance of the making of the leases. The Santa Barbara-Ventura coastline has been the subject of oil development for many years. It had, in 1968, upwards of 200 wells drilled under State leases from platforms within the three-mile limit.

On January 28, 1969, an oil spill took place from a well operated on what is known as Platform A, owned by Union, Texaco, Gulf and Mobile. The Secretary of the Interior thereafter shut down Santa Barbara Channel oil operations on February 7, 1969, and authorized resumption on April 2, 1969, after receiving the report of a presidential special commission known as the "DuBridge Commission". The commission recommended producing oil from certain zones in order to lower pressures and decrease leakage.

The federal leases grant the right to extract oil and gas. Applicable regulations require that the actual program for development be submitted to the Department of the Interior, step by step, so that each stage is reviewed before implementation. Once Interior approves the drilling of a particular well, or the installation of a particular platform, in navigable waters, it is then necessary for the companies to obtain a permit from the Army Engineers to make the necessary offshore installa-

tions. The Engineers do not normally hold hearings with respect to installations theretofore approved by the Department of the Interior. These practices were originally fixed by letters between the Departments,[1] the object being to avoid unseemly interdepartmental conflict. When departmental practice was challenged in this case, the practice followed by the departments was made express by regulation.[2] At the present time, there are upwards of 1000 O.C.S. wells operating which were drilled under these practices in various waters of the United States.

(b) These Lawsuits.

Three cases are presented by plaintiffs' petition: The *first, Weingand v. Hickel* is a suit against Secretary Hickel and the four companies which owned the well involved in the January 28, 1969, spill. It sought an injunction against implementation of the recommendations of the DuBridge Commission without a prior hearing and release of certain data. The basic part of the DuBridge Commission's recommendations was that, to prevent further leakage pressures should be promptly lowered in the oil zones whence leakage comes by producing oil from those zones. (Leakage in one degree or another from those zones to the surface has been a continuing problem long antedating oil production, or indeed, human habitation in the area.)

The *second* suit, filed at a later date, *Santa Barbara v. Hickel,* is against the Secretary, the four Platform A companies, and almost all other companies operating in the Channel under United States leases. (No suit

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[1]Record, pp. 175-178; Appendix A hereto.

[2]33 C.F.R. 209.120(g)(3).

has been brought against State leaseholders.) It asserts that the O.C.S. Act, 43 U.S.C. §§ 1331-1343, is unconstitutional. The theories stated are an improper delegation of legislative authority to the Secretary, asserted want of due process in that hearings are not held, and an asserted Ninth Amendment "right to beauty." The complaint also claims that the Secretary was not authorized to issue the leases. Obviously, the O.C.S. Act did so authorize.

The *third* lawsuit, *Santa Barbara v. Malley,* sought to enjoin the District Engineer (of the Army Engineers) from issuing permits for the construction of platforms or the drilling of wells under O.C.S. leases without having a public hearing.

(c) The Proceedings for Preliminary Injunctions.

The defendants who have joined in this response are parties to *Santa Barbara v. Hickel,* and *Santa Barbara v. Malley,* not to *Weingand.* They were not involved in the Platform A spill. But plaintiffs have mixed up all three cases in their papers and proceedings, and the Court of Appeals' opinions combine *Weingand* and *Santa Barbara v. Hickel.* Therefore, we describe all three.

First, as to *Weingand:*

In *Weingand,* in a complaint filed July 10, 1969, the individual plaintiffs sought a preliminary injunction against implementation of the recommendations of the DuBridge Commission unless a hearing was first held and certain data was first made public. That injunction was denied, the Court finding, *inter alia,* that any such interference by the Court might well increase the hazard of oil leakage onto the coast.

Second, as to *Santa Barbara v. Hickel:*

Shortly after the filing of *Santa Barbara v. Hickel*, a motion for summary judgment, seeking a declaration of the unconstitutionality of the O.C.S. Act, was made by plaintiffs before a three-judge court. About three months after that, a motion for preliminary injunction was made on papers bearing the captions of all three cases, but referring solely to proceedings in *Weingand*. The gist of the latter motion was that a preliminary injunction had previously been denied in *Weingand* on the assumption that the DuBridge Commission's recommendations would be implemented only in part, and, plaintiffs asserted, that more was happening. So far as *Santa Barbara v. Hickel* is concerned, the motion for a preliminary injunction rested entirely on the claim that the O.C.S. Act is unconstitutional. However, in ruling on the motion for summary judgment, the three-judge court rejected the claim of unconstitutionality, of the O.C.S. Act and denied the motion, finding the Act constitutionally valid. The District Judge, one of the members of the three-judge court, then denied the plaintiffs' motion for preliminary injunction.

Third, as to *Malley:*

In *Malley*, the motion for preliminary injunction was based principally on the theory that the regulations of the Department of the Army required a hearing. The District Court found that they did not.

In all cases, the District Court found that, in addition, plaintiffs had not shown that they would be injured by a denial of a preliminary injunction; that defendants had shown they would suffer very great damage should such an injunction be awarded; that a substantial bond would be required if an injunction

were to be issued, and plaintiffs had indicated no willingness or ability to provide such a bond.

(d) The Appeals.

While the appeal was pending in *Malley*, the rules of the Army Engineers were amended to specify that a hearing would "not ordinarily be granted" on an application to construct facilities to implement an Interior Department O.C.S. lease. This put into the regulations a practice previously followed under an exchange of letters between the Departments (see footnote 1, page 5). The appeal was argued on the rules in effect at the time of the argument, and decided accordingly.

In all three cases on appeal (and to some extent at the trial level), plaintiffs argued that all statutes and rules in question should be construed to require a hearing to save their constitutionality. In general, the Court of Appeals declined to act on this argument because the questions of constitutionality were before the three-judge court.

(e) Matters at Present Before the Three-Judge Court.

Plaintiffs have gone beyond the record in these cases to suggest that jurisdiction should be retained in this Court because related matters before the three-judge court could come here on direct appeal. Since the matters before the three-judge court may not be related to the issues raised in plaintiffs' petition, some supplementation is necessary to give a complete picture.

Plaintiffs now have pending, among others, a motion to amend the complaints in the cases before the three-judge court to attempt to state claims under the National Environmental Policy Act of 1969, 43 U.S.C. §§ 4331, *et seq*. Those motions are opposed on the

ground that the effect would be to interject new issues (concerning a statute not yet adopted when the complaints were filed) which properly belong to a single Judge, not a three-judge court, since such issues are statutory, not constitutional. Plaintiffs have also filed a motion for a new preliminary injunction: (a) to enjoin the Secretary of Interior from "reconsidering" operations in the Santa Barbara Channel without a hearing, and (b) to enjoin the implementation of the "Santa Ynez Unit" without such a hearing. (The Santa Ynez Unit would operate certain leases as a single parcel instead of as separate parcels.) Whether the amendments will be allowed; whether these issues will ultimately be decided by three Judges or one, is of course presently not known to the parties.

(f) Matters Before Congress.

One more item of background needs to be mentioned. Following a review of the Santa Barbara situation, the Administration has made a proposal to Congress for legislation, which essentially would provide that approximately 20 leases be bought back by the United States, and paid for out of oil from the Elk Hills Naval Reserve. Those proposals are presently subject to hearings before the Congress. We mention this simply because our impression is that all these cases are attempts, on one theory or another, to invalidate judicially the Santa Barbara Channel leases. Obviously, in view of the amounts received by the United States for the leases, and the general problem of just compensation (as well as problems of adequte fuel supply), consideration of the advisability of termination of the leases, in whatever manner, presents problems which should be appropriately resolved only by Congress.

III.

Argument.

In the present case, the issues of whether leases should be granted has long since been decided by Congress and the executive branch, acting through the Department of the Interior. The demands for hearings can now relate only to the daily work of authorizing exploratory wells, authorizing platforms, supervising the manner of drilling and depth of the wells, making certain safety precautions are followed, and so on.[3] It cannot be seriously asserted that there is a constitutional right to a hearing at each such step, plaintiffs cite no decisions which support the claim of such a right. Indeed, the right of the United States, under the Constitution, to develop the lands of the United States in whatever fashion Congress wishes, is settled.

United States Constitution, Art. IV, §3, ch. 2;

Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336, 83 S. Ct. 379, 382 (1963);

Alabama v. Texas, 347 U.S. 272, 274 (1954);

Gibson v. Chouteau, 80 U.S. (13 Wall.) 93, 99 (1872).[4]

Moreover, the "hearing" plaintiffs seek is apparently not an adjudicatory hearing, but is rather a sort of town meeting, in which literally millions would have the right to be heard, and in which the merits of off-

---

[3]Plaintiffs state that they do not claim a hearing every time the oil companies turn a screw (Pet. p. 4, fn. 2.). But decisions, in detail, of just this sort, *i.e.*, the drilling of particular wells, the construction of particular platforms, and all the detail of ongoing work, is all there.

[4]Plaintiffs assert that the Environmental Policy Act of 1969, 42 U.S.C. 4331 *et seq.*, in some way changed the rule of these cases. That is not explained and is not so.

shore oil production vs. imports, and the ecological and economic effects of each would be debated. The Constitution does not require that policy be formulated in this way.

> *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 36 S. Ct. 141 (1915).

So far as *Weingand* and *Santa Barbara v. Hickel* are concerned, the cases involve the purest question of judicial descretion. *Weingand* concerns the propriety of the DuBridge Commission's recommendations. That Commission was specially appointed by the President to advise concerning further action, after the January 28, 1969 spill. Its advice included the recommendation that depletion of certain reservoirs should go promptly forward, in order to minimize leakage. The Court was surely within its discretion to conclude that judicial interference with the DuBridge recommendations would be imprudent. If the Court chose to enjoin implementation of the recommendations and leakage was the consequence, others, as well as plaintiffs, would suffer loss. Such an exercise of discretion will not be reviewed, absent clear abuse.

> *Keyes v. School District No. 1, Denver, Colorado*, 396 U.S. 1216, 90 S. Ct. 12 (1969);
>
> *Alabama v. United States*, 279 U.S. 229, 49 S. Ct. 266 (1929).

In *Santa Barbara v. Hickel*, the issues were at best spuriously constitutional. The three-judge court was duly convened at plaintiffs' request despite the fragility of their claims of constitutional violation raised by plaintiffs' motion for summary judgment. The court

rejected the claim that there was a constitutional right to a hearing and denied plaintiffs' motion for summary judgment. The court found the O.C.S. Act and its regulations valid. The single district judge, a member of the three-judge court, could hardly then grant a preliminary injunction on the ground that the O.C.S. Act was constitutionally invalid and that the three-judge court was wrong. The proper remedy for plaintiffs is not to ask the Court of Appeals in effect to overrule the three-judge court. Plaintiffs' remedy is to appeal to this Court at the proper time from a final judgment rendered by the three-judge court. Had the Court of Appeals "saved the constitutionlity" of the O.C.S. Act and the regulations by requiring a hearing when the three-judge court had found the Act and regulations valid without benefit of such salvation, the Court of Appeals would have effectively reversed the three-judge court.

Much the same conclusion follows in the *Malley* case, although for different reasons. The *Malley* case is the Army Engineers' case. In making their argument, petitioners omit the critical regulation:

> "Since the Corps of Engineers considers only the effect on navigation and national security, public hearings will not normally be held in connection with applications for permits for artificial islands or fixed structures on Outer Continental Shelf lands under mineral lease from the Department of the Interior which has responsibility for other aspects of the public interest. Public hearings will be held by the Corps of Engineers only when in the District Engineer's judgment opponents have a reasonable complaint based on inter-

ference with navigation or on adverse effects on national security."

33 C.F.R. 209.120(g)(3).

Plaintiffs' proposed "evidence", to be offered before the Engineers, does not direct itself to the location of particular platform or wells. It consists entirely of generalized material relating to desirability of any oil development in the Channel, on the theory that any well may leak, and any platform might be hit by a ship. The Engineers have by now issued permits for hundreds of wells on the California coast within State waters, and at least a thousand offshore in the Gulf. It is surely within their discretion to decide that such general opposition to any oil development anywhere does not justify a deviation from the usual rule spelled out in the regulation cited above.

Beyond that, the injunction is sought prospectively, and not, therefore, on the basis of the showing made by plaintiffs, affidavits, which were concerned entirely with permits now outstanding. The validity of those permits is not now challenged. As to the future, how could the Court of Appeals direct that hearings be routinely held by the Engineers under a regulation which says they routinely will not?

It is clear that there was no abuse of discretion in denying preliminary injunctions. Costs are purely a matter of discretion. *A fortiori* there was no abuse in awarding costs to respondents below.

Concerning the desirability of holding plaintiffs' petition "on ice" until the three-judge court acts, it seems enough to say that no man can foresee when that will be, in view of plaintiffs' restructuring of those cases.

The issue of those cases, such as they are, and whatever they will be, will doubtless stand on their own feet when and if those cases appear here. We respectfully submit that the petition should be denied.

Respectfully submitted,

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APPENDIX A

Interdepartmental Correspondence on Allocation of Responsibilities on the Outer Continental Shelf

Department of the Army
Washington, D. C. 20310

OCE CIVIL Functions, RAH
77084/89May68
10 May 1968

Honorable Stewart L. Udall
Secretary of the Interior
Washington, D. C. 20240

Dear Mr. Secretary:

I refer to my recent letter concerning the permit issued to Phillips Petroleum Company to install an offshore drilling and offloading platform in the Santa Barbara Channel off Carpinteria, California.

During a conference in my office on 15 February your staff engineer, Mr. Eugene W. Standley indicated that the Department of the Interior attempts to involve the general public interest aspect of offshore drilling leases on the Outer Continental Shelf prior to the actual publication in the Federal Register of proposed acceptance of sealed bids for oil and gas leases. This is done by discussions with the local authorities concerned over the areas to be leased. He indicated that in some instances public hearings are held to give all concerned an opportunity to be heard.

Subsequent to the granting of a leased area, if an oil or gas discovery is indicated, the lessee must obtain a Department of the Army permit in accordance with Section 4 of Outer Continental Shelf Act (43 USC 1341)

APPENDIX A.

Interdepartmental Correspondence re: Allocation of Responsibilities on the Outer Continental Shelf.

Department of the Army
Washington, D. C. 20510

OCE/Civil Functions: RAH
77084/9May68
10 May 1968

Honorable Stewart L. Udall
Secretary of the Interior
Washington, D. C. 20240

Dear Mr. Secretary:

I refer to my recent letter concerning the permit issued to Phillips Petroleum Company to install an offshore drilling and production platform in the Santa Barbara Channel off Carpinteria, California.

During a conference in my office on 15 February your staff engineer, Mr. Eugene W. Standley indicated that the Department of the Interior attempts to resolve the general public interest aspect of offshore drilling leases on the Outer Continental Shelf prior to the announcement in the Federal Register of proposed acceptance of sealed bids for oil and gas leases. This is done by discussions with the local authorities concerned over the areas to be leased. He indicated that in some instances public hearings are held to give all concerned an opportunity to be heard.

Subsequent to the granting of a leased area, if an oil or gas discovery is indicated, the lessee must obtain a Department of the Army permit in accordance with Section 4 of Outer Continental Shelf Act (43 U.S.C. 1333

(f)). Section 4 states that "The authority of the Secretary of the Army to prevent obstructions to navigation in the navigable waters of the United States is hereby extended to artificial islands and fixed structures located on the Outer Continental Shelf." In our consideration of a lessee's application for a permit in compliance with Section 4 of the Act we have found that the matter of the general public interest is again raised either as a result of our public notices or at the public hearing when held.

In order to expedite our consideration of these applications for approval of artificial islands and fixed structures on the Outer Continental Shelf, it was suggested that we look to the Department of the Interior to assume and express the Federal Government's responsibility for all aspects of the general public interest except navigation. In implementing that suggestion we would expect the Department of the Interior to respond promptly to our public notice on an application and that the response would cover all aspects of the general public interest except navigation and national security. We would hold public hearings only when requested by the Department of the Interior; when there was indicated a legitimate objection to the structure from the standpoint of navigation; or when some substantive general interest problem arose which was not covered by the response of the Department of the Interior. In the latter case, we would consult with the Department of the Interior to determine the need for a public hearing and the desirability of joint participation by the Department of the Interior in conducting the hearing.

We believe that this procedure would avoid a repetition of the long delay encountered in our considera-

tion of the recent Phillips Petroleum Company application.

Your favorable consideration of the procedure outlined above should go far in improving the over-all procedure of the Government and the acceptance of our coordinating procedures.

We would appreciate receiving your concurrence or comments at an early date.

Sincerely yours,

(Signed) Robert E. Jordan, III
Robert E. Jordan, III
Special Assistant (Civil Functions)

cc: R. A. Hertzler, Civil Functions 2E621
ASG, OSA
OCE, Room 2306
South Pacific Div.
Los Angeles Dist.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Dear Mr. Jordan:

This Department welcomes the opportunity afforded by your letter of May 10 to offer suggestions on procedure for issuing permits for structures on Outer Continental Shelf leases.

At the outset, it appears that we are faced with a unique situation under which a private party is encouraged to pay more than $11,000 per acre to one agency of the Federal Government for the privilege of lease exploration and development, and then must approach another agency of the same Government for permission to install the necessary facilities. Clearly in these circumstances it is essential that the Government put its own house in order. To the maximum possible extent, the Government should assure that there is no bar to lease development *before* a lease offering is made. Your interest is therefore both timely and appropriate in view of the increasing value being placed on OCS resource-potential.

Your letter refers to measures utilized by this Department to resolve local questions or objections on the area to be leased, including discussions with local authorities and community interests. While we have, in the past, held informal meetings and discussions with local authorities and interested groups and individuals, it is our intention to adopt a formal procedure for receiving the views of all interested parties prior to each sale. In addition to those measures, and of more direct

import here, our pre-lease activities have and will continue to include extensive coordination with affected Federal agencies, including the Department of Defense, Coast Guard and Justice Department, as well as giving full consideration to the fisheries, water quality, outdoor recreation and general scientific interests of this Department. In the Santa Barbara Channel sale of last February, for example, certain blocks were deleted from the lease offering and others encumbered by a "save harmless" clause because of potential interference with defense and space installations in the area. In the Texas sale conducted on May 21, adjustments were made to avoid any conflict with shipping fairways and anchorages essential to adjacent commercial port operations.

It seems to us that the best way to avoid such duplications and delays as were experienced in connection with the Phillips application is to include your navigational interest in the advance coordination process. I would propose, therefore, that the Department of Defense agency (currently the Office of the Assistant Secretary of Defense (Installations and Logistics)) normally providing such coordination service be requested to secure and reflect your views in its general comment on leasing proposals, along with those of the military functions of the Defense Department.

Hopefully, most of the potential problems which might later require your attention would be eliminated in the coordination process. In the discharge of your responsibility toward navigation, a permit requirement should continue. However, inasmuch as our procedures will give local authorities and interested groups an opportunity to present their views in advance of the

sale, objections to the issuance of a permit by you and hearings thereon may be limited to situations where there is a plausible basis for alleging interference with navigation.

We suggest that every effort be made to resolve these matters as soon as possible to provide for the orderly conduct of planned operations in the Santa Barbara Channel. The responses from our two Departments should be effectively coordinated to achieve optimum regulations of these operations on the West Coast and we further suggest that a uniform application of this arrangement be applied to the Gulf Coast when the matters are resolved.

Sincerely yours,

(sgd) David S. Black
Under Secretary of the Interior

Mr. Robert E. Jordan, III
Special Assistant (Civil Functions)
Department of the Army
Washington, D.C. 20310

SUBJECT INDEX

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IN THE

Supreme Court of the United States

October Term, 1970
No. 695

COUNTY OF SANTA BARBARA, a political subdivision of the State of California; THE CITY OF SANTA BARBARA, a municipal corporation of the State of California; ALVIN WEINGAND; JACK D. KISCH; REYNOLDS YATER; JINNIE HUGLIN; NORMAN SANDERS; MARGARET D. GREENWALD; ARTHUR DAYTON; LEWIS MOTTER SMITH; MRS. GEORGE SIDENBERG, JR.; MRS. KENNETH PECK; ROBERT O. EASTON; CHARLES M. CAMPBELL, JR.; KENNETH MILLAR; WILLIAM URE; JAMES BOTTOMS; FRED EISSLER; NORMAN S. NYCE; MRS. H. R. BENHAM, JR.,

Petitioners,

vs.

ROBERT J. MALLEY, Los Angeles District Engineer, Corps of Engineers; WALTER J. HICKEL, Secretary of the Interior, United States of America; WILLIAM T. PECORA, Director, United States Geological Survey; D. W. SOLANAS, Regional Supervisor, Oil and Gas Division, United States Geological Survey; LEE DuBRIDGE, Science Advisor to the President of the United States; JOHN S. STEINHART, Office of Science and Technology and Executive Secretary to the Special Panel on the Future of the Union Oil Lease; UNION OIL COMPANY OF CALIFORNIA, a California corporation; MOBIL OIL CORPORATION, a New York corporation; PHILLIPS PETROLEUM COMPANY, a Delaware corporation; STANDARD OIL COMPANY OF CALIFORNIA, a California corporation; HUMBLE OIL AND REFINING COMPANY, a Delaware corporation; TEXACO INC., a Delaware corpora-

(Continued on next page)

tion; ATLANTIC-RICHFIELD COMPANY, a Pennsylvania corporation; GULF OIL COMPANY, a Pennsylvania corporation; PAULEY PETROLEUM, INC., a Delaware corporation; COLORADO OIL AND GAS CORPORATION, a Delaware corporation; MESA PETROLEUM CO., a Delaware corporation; McCULLOCH OIL CORPORATION OF CALIFORNIA, a Delaware corporation; J. M. HUBER CORPORATION, a New Jersey corporation; HUSKY OIL COMPANY OF DELAWARE, a Delaware corporation; SUN OIL COMPANY, a New Jersey corporation; SHELL OIL COMPANY, a Delaware corporation; WESTERN OFFSHORE DRILLING AND EXPLORATION CO., a California corporation; and PETER BAWDEN DRILLING, INC., a Delaware corporation,

Respondents.

Brief of Respondents Union Oil Company of California, Mobil Oil Corporation and Gulf Oil Corporation in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinions Below.

The District Court did not write an opinion in denying the motions for preliminary injunction. The opinion of the Court below in *County of Santa Barbara, et al. v. Malley, et al.* is reported at 426 F. 2d 171 (Appendix A to Petition,* pp. 1-6). The opinion in *County of Santa Barbara, et al. v. Hickel,* and *Weingand, et al. v. Hickel, et al.* is reported at 426 F. 2d 164 (Appendix, pp. 7-19).

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented.

In each of the three cases involved in the Petition,** there is but one narrow question presented:

> Did the District Court abuse its discretion in denying the preliminary injunctions sought in the respective cases?

Statement of the Case.

These cases involve oil drilling and production operations in the Santa Barbara Channel. On or about April 1, 1968, following competitive bidding, the Secretary of the Interior awarded leases to the non-gov-

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*Hereinafter cited as (Appendix, p. ....)

**The three cases were consolidated for briefing by the Court of Appeals and have been grouped together in the Petition. Accordingly, we will treat all three cases in this response.

ernment respondents authorizing them to explore for oil and to construct and operate oil production facilities on the Outer Continental Shelf in the Santa Barbara Channel. This was done pursuant to the authority vested in the Secretary of the Interior under the Outer Continental Shelf Lands Act, 43 U.S.C., Sections 1331, *et seq.*

On January 28, 1969, oil and gas began to escape under and near oil drilling Platform A located in the Santa Barbara Channel. Platform A is a facility constructed and operated by respondent Union Oil Company of California under and pursuant to a lease awarded it in the manner above described.* On February 7, 1969, the Secretary of the Interior ordered cessation of all oil drilling and production operations in the Santa Barbara Channel. At the direction of the President, the Secretary of the Interior then appointed a panel of experts, popularly known as the DuBridge Panel, to make recommendations to reduce the oil spillage and to minimize the possibility of further oil spills. On May 27, 1969, the panel issued its recommendations and shortly thereafter Union Oil Company of California commenced the implementation of said recommendations.

In October of 1969, Petitioners in *County of Santa Barbara v. Malley*, No. 25049 ("*Malley*") sought a

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*This facility was and is operated by Union Oil Company of California under agreement with its co-lessees and co-respondents herein, Mobil Oil Corporation, Gulf Oil Corporation and Texaco Inc.

mandatory preliminary injunction requiring Robert J. Malley, Los Angeles District Engineer, Corps of Engineers, to grant Petitioners a hearing on applications of Outer Continental Shelf lessees (including respondents) for permits to construct drilling and production facilities on the Outer Continental Shelf to be used in implementing the above described leases. The District Court denied the motion for preliminary injunction on the following grounds: (1) Petitioners did not show a strong likelihood that they would ultimately prevail on the merits, (2) Petitioners failed to show any substantial injury to any of their interests due to the denial of the hearings sought and (3) the non-government respondents demonstrated a great likelihood of substantial and immediate injury in the event preliminary injunctive relief was granted.

In *County of Santa Barbara v. Hickel*, No. 25413 ("*Santa Barbara*") and *Weingand v. Hickel*, No. 25414 ("*Weingand*") Petitioners sought to preliminarily enjoin the government respondents from allowing the drilling of any new wells in the Santa Barbara Channel without first (1) holding a public hearing and (2) making available to Petitioners and to the public, a reasonable time in advance of the hearing, the data upon which such respondents acted or intended to act with regard to remedial measures concerning the Santa Barbara Channel oil spill.

The District Court denied the motions for preliminary injunction in the *Santa Barbara* and *Weingand*

cases on the grounds, among others, that (1) Petitioners did not show sufficient need for the extraordinary relief which would be afforded by a preliminary injunction (2) Petitioners failed to show any irreparable injury and (3) the circumstances were such that the Court should not restrict the Secretary of the Interior's freedom of action in dealing with the urgent problem of oil spillage.

In the *Santa Barbara* and *Weingand* cases, a three-judge court was convened pursuant to 28 U.S.C., Sections 2282 and 2284 for the purpose of hearing constitutional issues. The three-judge court has ruled on certain motions raising constitutional issues; other matters which likewise raise constitutional issues are now pending before the three-judge court. In the *Malley* case a three-judge court was not convened. However, insofar as Petitioners may assert that they are entitled to an injunction on the basis of the alleged unconstitutionality of the regulations, that issue likewise must be heard by a three-judge court (Appendix, p. 6).

The Court of Appeals affirmed the orders of the District Court denying preliminary injunctions in each of the three cases. In affirming in *Malley*, the Court of Appeals concluded that the Petitioners "are not likely to prevail on the merits in this lawsuit, insofar as they rely upon the administrative regulations as the basis for their asserted right to hearings." (Appendix, p. 6). While doubting that Petitioners could establish a constitutional right to a hearing, the Court of Appeals

in *Malley* also said that if the Petitioners contend that the applicable statutes are unconstitutional because they do not expressly provide for hearings, Petitioners must take that question to a three-judge court. In the *Santa Barbara* and *Weingand* cases, the Court of Appeals, after reviewing the applicable statutes and regulations, concluded that the Petitioners have "failed to establish a right to an agency hearing before additional drilling on the outer continental shelf is allowed." (Appendix, p. 19). As to Petitioners' argument that the constitutionality of the Outer Continental Shelf Lands Act could only be saved by reading into the statute a requirement for hearings, the Court of Appeals held that such a constitutional attack must be made before the three-judge court convened by Petitioners.

ARGUMENT.

The narrow question presented by the Petition is the same issue presented to the Court of Appeals: Did the District Court abuse its discretion in denying the motions for preliminary injunction. As the Court of Appeals emphasized in affirming the District Court, the federal statutes and regulations involved do not require the hearings demanded by plaintiffs, and any constitutional issues as to the need for hearings must be presented to a three-judge court. Thus, the District Court correctly exercised its discretion in denying the preliminary injunctions. In any event, the Petition falls far short of sustaining the heavy burden required to justify the grant of certiorari to review these interlocutory rulings. *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893).

A. Petitioners Failed to Show a Likelihood of Prevailing on the Merits.

In *Malley*, the applicable regulations specifically provide that public hearings will "not normally be held" in connection with the application for the permits on Outer Continental Shelf Lands involved in that case. 33 C.F.R. Section 209.120(g)(3); 35 Fed. Reg. 80 (1970) (quoted, Appendix, p. 5). The regulations provide that hearings will be held "only when in the District Engineer's judgment opponents have a reasonable complaint based on interference with navigation or on adverse effects on national security." *Ibid.* While constitutional issues were properly reserved for the three-judge court, the Court of Appeals was also correct in concluding that there is little likelihood that

Petitioners could establish a constitutional right to a hearing because any hearing "would be concerned only with navigation and national security, would pertain to the use of lands controlled by the United States under lease to others, and would not purport to adjudicate the property rights of any of the plaintiffs." (Appendix, p. 6). In short, Petitioners failed to establish the likelihood of prevailing on the merits which is necessary for the granting of preliminary relief. *Perry v. Perry*, 190 F. 2d 601, 602 (D.C. Cir. 1951).

In the *Santa Barbara* and *Weingand* cases, Petitioners conceded that the Outer Continental Shelf Lands Act does not contain express language requiring the Interior Department to afford Petitioners the hearing they sought or to make available the data which they sought (Appendix, pp. 14-17). Petitioners' position was instead predicated on the argument that the applicable regulations require such a hearing (Appendix, p. 14). However, as the Court of Appeals found, the regulations cited in support of Petitioners' position do not require hearings, but merely authorize the Director of the Bureau of Land Management to hold public hearings if he wishes to do so (Appendix, pp. 15-17). Thus, it is equally clear in the *Weingand* and *Santa Barbara* cases that Petitioners are unlikely to prevail on the merits.

B. Petitioners Failed to Show Irreparable Injury.

In each of the three cases there was no adequate showing that Petitioners would suffer irreparable injury if preliminary injunctive relief were not granted. As the Court of Appeals observed, Petitioners failed to show that unless a preliminary injunction issued, there

would be another blowout or other physical damage of irreparable nature (Appendix, pp. 13-14). Instead, Petitioners attempted to show irreparable injury by asserting that they are entitled to a hearing before additional drilling is allowed and arguing that this right would be lost forever as to any new wells drilled prior to the disposition of litigation (Appendix, pp. 3, 13-14). The trouble with that line of reasoning is that it assumes that Petitioners will prevail on the merits. As we have shown, and as the Court of Appeals held, the likelihood is to the contrary, for no statute or regulation requires the hearings sought by Petitioners.

Beyond the failure of Petitioners to show irreparable injury, the District Court was entitled to consider the adverse effects on the public, as well as on the non-government defendants, of granting the injunctions demanded. See *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F. 2d 738, 743 (2nd Cir. 1953). In denying the injunctions in *Weingand* and *Santa Barbara*, the District Court properly gave weight to the fact that the preliminary relief sought by Petitioners would unduly restrict the Secretary of Interior's freedom of action in dealing with the oil spill and in fulfilling his duties under the Outer Continental Shelf Lands Act (Appendix, p. 13, n. 5). Such matters of public interest, taken together with the heavy damage to the non-government defendants if operations were brought to a standstill, are entitled to great weight in assessing the propriety of the District Court's action. *Yakus v. United States*, 321 U.S. 414, 440-441 (1944).

C. No Constitutional Issues Are Presented by the Petition.

At Petitioners' request, a three-judge court was convened to hear constitutional questions in the *Santa Barbara* and *Weingand* cases, pursuant to 28 U.S.C., Sections 2282 and 2284. In both cases Petitioners moved for summary judgment on their claims which challenged the constitutionality of the Outer Continental Shelf Lands Act and the regulations promulgated thereunder. The three-judge court, in an unreported order, denied the motions for summary judgment, holding that the Outer Continental Shelf Lands Act and the regulations promulgated thereunder "were not repugnant to the Constitution of the United States." (Appendix, p. 12).

Because all constitutional questions involved in the *Santa Barbara* and *Weingand* cases were reserved for the three-judge court, any such issues involved in the motions for preliminary injunction were not before the District Court or the Court of Appeals (Appendix, p. 19). And they are not now before this Court on the Petition for Writ of Certiorari. In the *Malley* case, insofar as Petitioners may assert that the applicable regulations are unconstitutional because they do not expressly provide for hearings as a matter of right, Petitioners must, since they seek an injunction, take that question to a three-judge court (Appendix, p. 6).

Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.*

Respectfully submitted,

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*Because the constitutional questions pending before the three-judge court in *Weingand* and *Santa Barbara* are entirely independent and different from the narrow question presented in the instant case, we urge that the Court not defer its action on the Petition.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 695

COUNTY OF SANTA BARBARA, ET AL., PETITIONERS

v.

ROBERT J. MALLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1–6, 7–19) are reported at 426 F.2d 171 and 426 F.2d 164.

JURISDICTION

The judgments of the court of appeals were entered on April 21, 1970. On July 22, 1970, the Chief Justice entered an order extending the time for filing a petition for a writ of certiorari to September 18, 1970. The petition was filed on September 15, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

469-449—70

QUESTION PRESENTED

Whether the district court abused its discretion in refusing to issue a preliminary injunction enjoining the Corps of Engineers and the Secretary of the Interior from authorizing the construction of platforms and the commencement of drilling operations for oil on federal offshore leases without first holding a public hearing.

STATEMENT

These cases arise out of the oil well blowout of January 1969 under Platform A in the Santa Barbara Channel (Pet. App. 3, 8). Essentially they are attempts to enjoin any further oil drilling in the Channel until a public hearing has been held by the Corps of Engineers or the Secretary of the Interior or both.

Chronologically the operative facts may be summarized as follows: Prior to the blowout, the Secretary of the Interior, pursuant to the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331 *et seq.*, had issued competitive leases to the respondent oil companies (Pet. App. 9). After the blowout, the Secretary, on February 7, 1969, ordered a cessation of oil production from Platform A. A panel of experts (the DuBridge Panel)[1] was appointed at the direction of the President to recommend actions to be taken to reduce the spilling and prevent future spills. The con-

[1] In one of the three cases involved in the instant petition, access to certain data underlying the DuBridge Panel recommendations was sought as incident to the claimed right to a public hearing. The underlying data has been made available to petitioners and thus its release is no longer at issue.

clusion of the panel, in essence, was that continued drilling and depletion of the area would reduce pressure and lessen the likelihood of blowouts (Pet. App. 9). The Secretary then authorized the Union Oil Company to drill new wells which it has now commenced. Meanwhile, on August 18, 1969, the Corps of Engineers issued notices relating to applications for permits to construct a proposed drilling platform in the Channel. On September 25, 1969, the Corps decided that some of the permits should issue and that no hearings would be held.

The procedural complexities of the three suits involved in the petition are fully set forth by the court of appeals (Pet. App. 10–13).[2] The net effect of all the procedures is an attempt by the petitioners to enjoin further drilling activities in the Channel until a public hearing has been held.

The district court denied a preliminary injunction in each of the three cases. The court of appeals affirmed in two opinions, on the ground that no statute or regulation governing the actions of either the Secretary of the Interior or the Corps of Engineers required a hearing to precede the contested federal action (Pet. App. 4–6, 14–17). The court of appeals expressly refrained from passing on the question whether the statute and regulations are constitutionally defective if they do not require a hearing in these circumstances, since that constitutional question had been referred to, and is now

[2] At one stage this Court denied petitioners' petition for a writ of certiorari from an order of the court of appeals vacating a restraining order it had issued. *County of Santa Barbara, et al.* v. *Malley*, 396 U.S. 950.

pending before, a three-judge district court (Pet. App. 17–18).[3]

ARGUMENT

The decisions below, which are limited to the interpretation of the pertinent statutes and regulations, are correct and present no substantial questions warranting review by this Court.[4] Because petitioners failed to show that they would be likely to prevail on the merits, the district court did not abuse its discretion in refusing to grant the requested preliminary injunctions—especially in light of the DuBridge Panel's recommendation to the Secretary that resumption of drilling would lessen the likelihood of another blowout.

1. The Outer Continental Shelf Lands Act and the administrative regulations thereunder on which petitioners rely (Pet. Apps. C, D, E and F) contain no provision requiring either the Secretary of the Interior or the Corps of Engineers to hold a public hearing prior to the authorization of further oil drilling or platform construction in this case. The only Department of the Interior regulation specifically referring to public hearings is one promulgated in August 1969 (34 Fed. Reg. 13549) which provides that a representative of the Sec-

[3] The applicability of the National Environmental Policy Act of 1969, 42 U.S.C. (Supp. V) 4321, *et seq.*, 83 Stat. 852, to petitioners' underlying requests for relief is also at issue before the three-judge district court (Pet. 11, n. 6).

[4] Petitioners suggest (Pet. 16–17) that this Court defer action on this petition until the three-judge district court has rendered its decision on the constitutional issues there presented. In our view, however, this petition, which involves only the denial of preliminary injunctions, presents no substantial question and such deferral is, therefore, unnecessary.

retary "may hold public hearings" in evaluating the likely effects of a proposed leasing program. 43 C.F.R. 3381.4 (Pet. App. 34–35). This regulation, which in terms is permissive rather than mandatory, is, in any event, not relevant here because the leases were all awarded in 1968,[5] prior to the blowout and the Secretary's suspension of drilling. Once the leases have been awarded (as here), their administration is principally a matter between the lessees and the Secretary, who is empowered under Section 5 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1334 (Pet. App. 23–26), to take such action as he deems necessary to conserve natural resources and prevent injury to life or property. See 30 C.F.R. 250.1, 250.11 and 250.12 (Pet. App. 29–31). While the regulations governing the administration of leases provide that a representative of the Secretary under certain circumstances "may consult with, and receive comments from, lessees, operators, and other interested parties," 30 C.F.R. 250.11 (Pet. App. 30), there is no requirement that the representative hold public hearings.

2. Since the Secretary of the Interior has the major responsibility under the Act for selecting tracts for

[5] Although no public hearings were held prior to the awarding of these leases, it is now the policy of the Secretary to conduct public hearings as a matter of course prior to a major oil or gas lease sale for offshore lands. Public hearings, for example, were recently held in conjunction with a major oil and gas lease sale for submerged offshore lands located off Western Louisiana. See 35 Fed. Reg. 8699. In October of this year, the Secretary submitted an environmental statement on the proposed lease sale to the Council on Environmental Quality, which statement was prepared in conformity with Section 102(2)(c) of the National Environmental Policy Act of 1969, 42 U.S.C. (Supp. V) 4332(2)(C).

leasing, selling the leases, and administering the leases and must consider the broad effects of such leasing on the environment, the role of the Corps of Engineers in determining whether to permit the construction of drilling platforms by lessees is limited to a consideration of the effect of such platforms on navigation. 43 U.S.C. 1333(f) (Pet. App. 23). As pointed out by the court below (Pet. App. 4–6), the pertinent regulations of the Corps of Engineers were recently amended to make the division of authority between the Secretary and the Corps explicit. The amended regulation reads in part (35 Fed. Reg. 79, 80; 33 C.F.R. 209.120(g)(3)) (Pet. App. 20):

> Since the Corps of Engineers considers only the effect on navigation and national security, public hearings will not normally be held in connection with applications for permits for artificial islands or fixed structures on Outer Continental Shelf lands under mineral lease from the Department of the Interior which has responsibility for other aspects of the public interest. Public hearings will be held by the Corps of Engineers only when in the District Engineer's judgment opponents have a reasonable complaint based on interference with navigation or on adverse effects on national security.

No one has seriously contended in the instant proceedings that the structures for which certain lessees are seeking Corps approval would physically interfere with navigation in the Santa Barbara Channel.[6]

CONCLUSION

For the foregoing reasons, the petitioner for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1970.

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[6] The responsibility for taking into account the possible adverse impact of oil leaks themselves (as opposed to the physical platforms alone) on navigation lies with the Secretary of the Interior as part of his supervisory obligations under Section 5 of the Outer Continental Shelf Lands Act.

U. S. GOVERNMENT PRINTING OFFICE: 1970

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IN THE

Supreme Court of the United States

October Term, 1970
No. 695

COUNTY OF SANTA BARBARA, *et al.*,

Petitioners,

vs.

ROBERT J. MALLEY, *et al.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY TO OPPOSITIONS.

The idea, expressed in the Government's opposition (p. 5) that once the leases have been let (the blow-out and its consequences notwithstanding)[1] the matter

[1]The January, 1969 blowout in the Santa Barbara Channel affected some 1800 square miles of water, 40 miles of shoreline and necessitated the closing of the Santa Barbara Harbor. [5 R. 1322-1324.] An affidavit by the Vice-President of defendant Union Oil Company, the company from whose Platform A the well which blew out was drilled, was to the effect that even as of the very early stages of this litigation, cleanup and restoration costs were in excess of $4,000,000. [6 R. 1634.] Numerous damage suits have been filed and it is reasonable to conclude that many millions of dollars of damage accrued, to say nothing of the unknown question as to permanent damage to the ecology. It is now known that the geological formation in which that well was drilled was actually damaged by the blowout. (President's Message to Congress, June 11, 1970.) Earlier, upon viewing the effect of the oil spillage in the Channel, President Nixon said, "The Santa Barbara incident has frankly touched the conscience

(This footnote is continued on the next page)

is then "principally" between the lessees and the Secretary of the Interior, cannot be accepted. At least if by this the Government means, as it apparently does, that the public will not be heard and must stand idly by while its natural resources and its coastal environment (described as to this area by the Council on Environmental Quality as "the most used natural recreational resources") are being desecrated. The Outer Continental Shelf Lands Act is a *conservation* statute. (43 U.S.C. 1332[b], 1334 [a] [1]; Pet. Appx. 21, 23-24.) And regardless of what may have been the correct construction of the Act and the Regulations vis-a-vis the right of the public, and shoreline communities, property owners and businesses, to hearings prior to the National Environmental Policy Act of 1969 (42 U.S.C. 4331, *et seq.*) it is now manifest that that latter Act calls for pulic hearings and that the Department of the Interior as well as the President have concurrently interpreted that Act to mean just that.[3]

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of the American people." [5 R. 1338.] Former defendant and Secretary of the Interior Hickel said of the tragedy: "[T]he blowout and resulting oil spillage that occurred during the ten-day period beginning January 28 was simply more than any sensible American should be expected to take." [5 R. 1344.] While former Secretary Udall described the event as "a conservation Bay of Pigs." [5 R. 1365.] In its First Annual Report, the Council on Environmental Quality referred (p. 11) to the Santa Barbara Channel as a "classic case" of exploiting resources with methods that create problems greater than the value of the resources themselves.

[3]In the Appendix hereto we set out in brief petitioners' argument as to how the Department of Interior regulations require public hearings. We contend that the court below erred in not accepting the argument. However, because the Department now has construed, as do petitioners, the National Environmental Policy Act to require hearings, it may not be necessary to determine whether the court below was in error as to the regulations. Petitioners seek a hearing. If they get it through the Environmental Policy Act, an additional right to the same thing by way of the regulations will be of no moment.

Thus, in his Executive Order 11514 (35 Fed. Reg. 4247) implementing the Environmental Policy Act, the President ordered (Sec. 2[b]) that in matters with environmental impact, every agency must institute procedures which "shall include, whenever appropriate, provision for public hearings and shall provide the public with relevant information on alternative courses of action." And on September 17, 1970, subsequent to the filing of the petition herein, the Department of the Interior added a new part (Part 516 DM 1-3) to its Departmental Manual "to fulfill the policy and directives of the National Environmental Policy Act . . . and of Executive Order No. 11514" (Part 516.1.1) and provided for hearings (Part 516.1.3D[6] and 516.2.10A).

Moreover, even before it added Part 516 to its Departmental Manual, the Department had recognized that the Environmental Policy Act called for hearings. In its Press Release of October 16, 1970, concerning leasing off the coast of Louisiana, the Department said:

> "*In keeping with the provisions of the National Environment Policy Act of 1969*, Secretary Hickel called for hearings on the question of oil and gas leasing in this area of the Gulf of Mexico. Beginning on July 14, 1969, three days of hearings were held in New Orleans, providing conservation groups, State and local agencies, and other interested parties the opportunity to voice their opinion on the proposed sale. (emphasis added.)
>
> "During the three days 110 persons presented oral testimony . . . The testimony represented a broad spectrum of interests including elected officials, consumer groups. offshore operators, oil companies, fishermen, sportsmen and environmentalists."

And in its October 22, 1970 Press Release on the same subject, the Department pointed out that "[n]otice of the hearing was published both in the Federal Register and widely in the press nationwide."

Accordingly, as authoritatively construed, the National Environmental Policy Act requires hearings. (This is but Congress' way of accepting the Secretary at his word when he said in the Department of the Interior's Press Release of August 22, 1969, "we are determined to conduct public business in a public manner" [4 R. 1086].) The fact that the President's Executive Order uses the words "whenever appropriate", does not detract from petitioners' point. The Department of the Interior has never contended that hearings as to Santa Barbara Channel would not be "appropriate". Its contention has been that they are not required. As we said, whatever may have been the situation before the addition of Part 516 to the Departmental Manual and under only the regulations, the Department has now unequivocally made clear that, in its view, the Environmental Policy Act requires hearings. We agree. The Department must follow its own rules. (*Service v. Dulles*, 354 U.S. 363.)[3]

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[3]In *Malley*, the regulations in effect when the suit was filed, clearly called for a hearing by the Corps of Engineers which petitioners seek. (33 C.F.R. 120[g]; 1969.) On January 3, 1970, the Corps of Engineers (as did the Department of the Interior in *Sierra Club v. Hickel*, pending here on petition for writ of certiorari to the same Court of Appeals, No. 939, O.T. 1970, when the right to a hearing was taken seriously by the plaintiffs there [Pet. 30]), purported to change the regulations (30 Fed. Reg. 80) so as to deny the right to a hearing.

While, concededly, *Sierra Club* and the instant cases are different, they are in some respects quite similar. At least the approach of the court below to the matter of public hearings and the status of the public's stake in environmental matters is the same in both cases. Thus, in this case the court below said that

Among the various oppositions to the grant of certiorari herein, it is suggested in Humble's (p. 4) that the local governments were granted a hearing before the leasing in the Channel took place. The Government opposition makes no such claim. It is not true that a hearing was afforded. It is true that letters were written and conferences held, but writing letters to, or having a conference with, a public official is not a hearing. (*Office of Communication of United Church of Christ v. F.C.C.*, 359 F. 2d 994, 1004 [CA DC 1966].) And a "hearing" without access to the information upon which the "opposition" is basing its claim, is likewise not a hearing within the proper meaning of the term. (*Morgan v. United States*, 304 U.S. 1, 18.) Moreover, as recognized by the Council on Environmental Quality, matters environmental or ecological were not even considered when the leasing was being offered. (First Annual Report, p. 11.)

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since hearings by the Corps of Engineers "would not purport to adjudicate the property rights of any of the plaintiffs" because (improperly, we say) limited to matters of "navigation and national security" (Pet. Appx. 6) and a hearing before the Department of the Interior would not prevent "another blowout or other physical damage of an irreparable nature" (Pet. Appx. 14), plaintiffs cannot prevail and accordingly it was proper to deny the injunctions sought and to allow new development in the Channel without there having been a hearing.

In *Sierra Club* (Appx. 16 to Petition for Writ of Certiorari), the court below denied standing to sue to that conservation society on the ground that it was not "aggrieved" or "adversely affected". The environmental interest was held to be insufficient. While in the instant case the court below did not question plaintiffs' standing, it is clear that its view of the right in both cases is the same: if the plaintiffs cannot show a property or some comparable loss, they have no interest to be protected. (This is not to suggest that the petitioners in the instant case—City and County of Santa Barbara which own property on the sea coast, beach property homeowners, boatowners, business men—do not have property interests which have been damaged and which may be damaged in the future by oil disasters in the Channel.)

Both former Secretaries of the Interior (Udall, when the leases were allowed, and Hickel, when the blowout occurred) have publicly acknowledged that to have allowed the leases was a serious mistake. That mistake took place without the responsible officials having had the benefit of the insight to be gained by hearings. The same mistake as to the future should not be allowed.

The impression is given by the opposition (*e.g.* Humble Br. 4; Govt. Br. 3; Union Br. 4) that the recommendations of the DuBridge Panel that there be continued drilling to relieve the pressures extant after the blowout, settled the matter so far as the result of the channel is concerned. This is not so. The DuBridge Panel report was limited to one area, the Dos Cuadros Field, and really to only one zone therein, the Repetto Zone. The instant cases involve the whole channel and its *future* development. There are large areas of the channel (much greater than that with which the DuBridge Panel was concerned) as to which the report of that panel had nothing to do, but which are involved in the instant petitions and as to large parts of which the Council on Environmental Quality has urged not be exploited.

The impression is left by the Humble opposition (pp. 5-6) (*e.g.*, "No suit has been brought against State leaseholders.") that development in the State leases, within the three-mile limit, is going forward. This is likewise not the case. Subsequent to the blowout California imposed a moratorium on drilling; it is still in effect.

What the Government means (Br. 7) by physical interference with navigation is not clear. But the Government and Humble (Br. 13) are mistaken if they intend to convey the idea that there is no danger to

navigation from the platforms and the attendant huge tankers they entail. Petitioners have sought a hearing to present these matters, but have been unable to get one.

Humble "mentions" (p. 9) the fact that certain legislation has been introduced in Congress regarding purchase back by the United States of some of the leases in the Channel. This, because of its "impression" (*ibid.*) that the instant cases are attempts to invalidate judicially the Santa Barbara Channel leases and it then argues that the advisability of the termination of leases is for resolution by Congress.

Whatever legislation is pending before Congress is pending before Congress. This petition is not concerned with that. Nor does this petition seek to invalidate, judicially, the leases in the Santa Barbara Channel. Petitioners are concerned with the right to a hearing and by this petition they seek to obtain one. Their right thereto is a judicial matter and for this Court.

The hearing petitioners seek is not directed at the daily work in the Channel. (Humble Br. 10.) It is concerned with major matters therein. Even now, there is pending before the Secretary of the Interior an application for the Santa Ynez Unit, an application for the unitization of 18 leases in the Channel affecting over 86,000 acres of territory, envisaging 4 or 5 massive platforms from each of which 60 wells can be drilled, and seeking to operate in great depths of water (700-1500 feet and later, perhaps, 2000 feet;—depths in which drilling has never been accomplished before. (The deepest has been 380 feet. The Santa Barbara blow-out was in waters 200 feet.) This is precisely the kind of a matter as to which the Secretary should hear all parties out—with all the data available for critical

scrutiny—so that when he does make his decision, it will be an informed one and not made merely on the presentation of the oil companies whose interest is, understandably, profits, not conservation or environment. Indeed, the whole future of oil operations in the Channel is a never ending question for the Secretary. The effects of the January 1969 blowout are not so easily forgotten. The proposed Santa Ynez Unit makes of the Santa Barbara Channel and of Santa Barbarans, a Guinea Pig. If this is to be done, a matter not before the Court in this petition, the "Guinea Pig" should be allowed to be heard.

Nor is the hearing petitioners seek one in which millions will be heard. (Humble Br. 10.) This kind of argument was properly and effectively dealt with in Mr. Chief Justice (then Judge) Burger's opinion in *Office of Communication of United Church of Christ, supra,* 359 F. 2d 994, 1006 (CA DC 1966). It is the kind of a hearing recognized, albeit belatedly, by the Secretary as proper and fasible in his now regulations which call for hearings when tracts are being offered for lease. (43 C.F.R. 3381.4; Pet. Appx. 35.) It is the kind of a hearing directed by the President in his Executive Order on the National Environmental Policy Act of 1969 [Ex. O. 11514; 35 Fed. Reg. 4247; § 2[b]], *supra,* and by the Department of the Interior in its Departmental Manual. (Part 516.1.3D(6) and 2.10A *supra.*)

But Humble is right—and candid in its efforts that it be not so—that a public hearing would consider matters ecological (as well as environmental, conservational, aquatic, aesthetic, recreational, etc. *Cf.* Sec. 101 of the National Environmental Policy Act, 42 U.S.C. 4331; 43 C.F.R. 3381.4; 33 C.F.R. 209.120[d]). It

is not to be forgotten that the Outer Continental Shelf Lands Act *is* a conservation statute and that "the character as high seas above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected." (43 U.S.C. 1332[b].)[4] The old way of doing things wherein the environment and the ecology were ignored, is gone.[5]

Petitioners, of course, dispute the suggestion of respondents (*e.g.*, Union Br. 10) approving, not surprisingly, the view of the Court of Appeals that there is little likelihood of success by plaintiffs on the merits. Quite the contrary, especially now that the President has ordered his executive subordinates to hold hearings (a directive that those in the case at bar thus far seem determined to disregard), it is very likely that plaintiffs will prevail. Moreover, the issues raised by plaintiffs are "serious, substantial, difficult and doubtful, (so) as to make them a fair ground for litigation and thus for more deliberate investigation." (*Hamilton Watch Co. v. Benrus Watch Co.*, 206 F. 2d 738, 740 [CA 2, 1953].) This is the standard which the court below

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[4]The National Environmental Policy Act of 1969, 42 U.S.C. 4331 *et seq.*, is, of course, a late—hopefully not too late—effort by Congress to see to it that the environment is no longer forgotten in our decision making processes. The effect of this Act on the current cases is presently pending before the District Court. It is one of the reasons we have urged this Court to defer disposition of this petition. We treat of this more in our Motion to Defer.

[5]As the President said in his February 10, 1970 message on the environment (116 Cong. Rec. H 743; 1970 U.S.C. & A.N. 112): "Like those in the last century who tilled a plot of land to exhaustion and then moved on to another, we in this century have too casually and too long abused our natural environment. The time has come when we can wait no longer to repair the damage already done, and to establish new criteria to guide us in the future . . . The tasks that need doing . . . call for fundamentally new philosophies of land, air and water use . . . for greater citizen involvement."

should have applied in considering whether the trial court abused its discretion in denying the preliminary injunctions.

Conclusion.

Only part of these cases is present before the Court in this petition. All parts should be here. Hence, our suggestion, made now by formal motion, that this Court defer disposition until the District Court acts. But, in any event, the petition should be granted.

Respectfully submitted,

GEORGE P. KADING,
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MARVIN LEVINE,
MELBOURNE B. WEDDLE,
Deputy County Counsels,
Attorneys for Petitioner County of Santa Barbara.

STANLEY T. TOMLINSON,
City Attorney,
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A. L. WIRIN,
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Attorneys for Non-Government Petitioners.

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IN THE

Supreme Court of the United States

October Term, 1970
No. 695

COUNTY OF SANTA BARBARA, *et al.*,

Petitioners,

vs.

ROBERT J. MALLEY, *et al.*

MOTION TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI.

Petitioners move the Court to defer consideration of the petition for writ of certiorari. (*Brown v. United States,* .... U.S. ...., No. 5497 O.T. 1970, 30 U.S. Law Week 3167; *Murray v. City of New York,* 308 U.S. 528, 310 U.S. 610, 311 U.S. 720.) The reasons for the motion are these:

1. Among the matters pending before the District Court, Central District of California, in the two *Hickel* (now *Russell* [Rule 25(d), Federal Rules of Civil Procedure]) cases (*County of Santa Barbara v. Russell,* No. 69-636, *Weingand v. Russell,* No. 69-1317) are plaintiff's motions for preliminary injunction to require the holding of hearings, with access to information, before the Secretary of the Interior authorizes further major significant oil activity in the Santa Barbara Channel and to require him, before making such decisions, to comply with the National Environmental Policy Act. The motions for preliminary injunction are based on the ground of repugnancy to the Constitu-

tion of the Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*), on denial of due process (including the equal protection guarantee thereof) in the refusal of the Secretary of the Interior to afford a hearing, and on the ground that the National Environmental Policy Act of 1969 (42 U.S.C. 4331 *et seq.*), enacted subsequent to the filing of the lawsuits, requires certain action by the Secretary, including the holding of hearings, before such major decisions are made.

In the two *Russell* cases, a three-judge court has been convened. The order of that court, either granting or denying the preliminary injunction, is appealable to this Court. (28 U.S.C. 1253.) Accordingly, those two cases should shortly be before this Court. (It is assumed the losing side will appeal. Plaintiffs will, should their motion be denied. If the preliminary injunction is granted and defendants do not appeal [an unlikely happening] the instant petition would probably be moot making decision thereon unnecessary.)

Prominent among the issues before the District Court is the applicability of the National Environmental Policy Act to the major decisions the Secretary of the Interior is required to now make in the Santa Barbara Channel, (having in mind the blow-out of January, 1969) as well as the proper construction of that Act vis-a-vis whether hearings are required under it before those decisions are made. Though not a "repugnancy" issue within the meaning of the 3-judge court statute (28 U.S.C. 2282), the issue is squarely before that court which has jurisdiction to decide it (*United States v. Georgia Public Service Corporation*, 371 U.S. 285, 287-288) and it can be expected that it will.

Of course, the applicability and construction of the Environmental Policy Act could be decided by this Court in the instant petition. (*Ziffren v. United States*, 318 U.S. 73, 78.) But it is preferable, we would think, that the matter first be explored by the lower court so that on review this Court would have the benefit of the record made in that court and of that court's views. Indeed, when intervening legislation or regulations occur, this Court often remands for the lower court to consider the case in the light of that change. (*Thorpe v. Housing Authority of the City of Durham*, 386 U.S. 670.)[1] Since that consideration is now momentarily to take place in the District Court, it would be appropriate, we submit, for this Court to await that court's ruling and then pass upon the whole case, including the presently pending petition, on review of that judgment.

2. We believe the lower court was mistaken in passing to the three-judge court *all* "constitutional" issues. (Pet. Appx. 17.) See *Gunn v. University Committee to End the War in Viet Nam*, 399 U.S. 383. But having done so, and since, presumably, the three-judge court will now pass on all of them, it would likewise be preferable, from a mere man-hour consideration, for this Court to await the three-judge court ruling rather than remand the instant cases for what will then be a dual determination.

3. Likewise, in our mind, the Court of Appeals was in error in holding that the Regulations, properly

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[1]Though the National Environmental Policy Act was extant while these cases were before the Court of Appeals, the impact of that Act was urged before that Court. This, quite candidly, because counsel for petitioners did not appreciate the thrust or impact of the Act until Judge George L. Hart, Jr.'s ruling in *Wilderness Society v. Hickel*, ... F. Supp. ...., 1 E.R. 1335 (DC DC 1970).

interpreted, do not require the Secretary to hold public hearings when so large a public interest is at stake as was, and is, the case as to the future of oil activity in the Santa Barbara Channel following the blowout. The Regulations do so provide and if they do not, the Constitution does, both as a matter of due process and as a matter of equal protection as encompassed within the 5th Amendment. The regulations clearly give hearings and due process to the oil companies (e.g., 30 C.F.R. 250.81; Pet. Appx. 31-32), including judicial review. (30 C.F.R. 250.82; Pet. Appx. 32.) They are, we concede, "interested parties". (30 C.F.R. 250.11; Pet Appx. 30). But so also are the members of the public, at least those who, as here, are the local government entities and citizens living and working on the sea coast vitally affected by the activity. See Appendix to Petitioners' Reply to Oppositions to Petition for Writ of Certiorari.

These being injunction suits which look to the future, this Court is faced with the question as to whether petitioners are entitled to a preliminary injunction as of now. (*Douglas v. City of Jeannette*, 319 U.S. 157, 163.) The presence of the National Environmental Quality Act makes it necessary, therefore, that that act be considered in determining that question, including whether that Act, interpreted as it has been by the President [Ex. O. 11514; 35 Fed. Reg. 4247; §2[b]] to encompass hearings, requires a hearing now, before, for example, the Secretary passes on the application pending before him for the Santa Ynez Unit, a unitization application covering some 86,000 acres of Channel area and requesting drilling in waters deeper than has ever been done before. (See Reply to Oppositions to Petition for Writ of Certiorari, p. 7). In-

deed, with changes occurring so often, as they have during the course of this litigation, there is no doubt that the new Secretary of the Interior will be considering afresh the whole question of the future of the channel. In that consideration, as the Environmental Quality Act envisages, the public, and, particularly, the local entities, must be heard.

All these matters will be urged upon the District Court when it hears the injunction applications. We have requested, indeed pleaded with, the District Court for an early hearing. We therefore urge this Court to defer consideration of the petition for writ of certiorari to await that court's disposition of the injunction applications.

Respectfully submitted,

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MARVIN LEVINE,
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City Attorney,
Attorney for Petitioner City of Santa Barbara.

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FRED OKRAND,
Attorneys for Non-Government Petitioners.

APPENDIX.

Argument Showing How the Regulations of the Department of the Interior Require Public Hearings.

The court below, incorrectly we submit, rejected petitioners' contention that, properly construed, the regulations, even before the Environmental Policy Act, granted and grant the public the right to a hearing. Petitioners' argument is that Regulations recognize the rights of "interested" parties (30 C.F.R. 250.11; Pet. Appx. 30); that persons and public entities such as petitioners are, in the very nature of things, "interested parties"; that any operations that are allowed must be so conducted as "to prevent damage to, or waste or (sic) any natural resource or injury to life or property;" (30 C.F.R. 250.12[a]; Pet. Appx. 30-31) to this end, it is expressly provided that an appeal from any order of the District Supervisor may be taken to the Director of the United States Geological Survey with provision for written argument both on the facts and the law, with a similar appeal thereafter permitted to the Secretary, likewise on the facts and the law (30 C.F.R. 250.81[a][b][c]; Pet. Appx. 31-32); that before any of these officers, the supervisor, the Director, the Secretary, oral argument may be permitted on motion at a time to be fixed by the officer (ibid, subdivision [c]). And, finally, that provision is made allowing "any interested party" to seek judicial review. (30 C.F.R. 250.82, Pet. Appx. 32.) From this regulatory scheme, petitioners contend they are entitled to hearing just as much as are the oil companies. That if the regulations are not so construed, petitioners are denied due process of law under cases of this Court such as those cited at page 10 of their petition. Peti-

tioners additionally contend that if the regulations are not read to afford them a hearing while affording it to the oil companies, they are invidiously—and therefore unconstitutionally—being discriminated against within the equal protection principle established by cases such as *Kramer v. Unified Free School District*, 395 U.S. 621 and *Cipriano v. City of Houma*, 395 U.S. 701, where this Court invalidated legislation which allowed only property owners or parents to vote on municipal bonds (which would be paid for by property taxes). There it was held there was no compelling state interest sufficient to justify preventing others—albeit not so closely connected, pocketbook-wise—from this participation in public affairs. In a sense the scheme of the legislation in those cases was a denial of the right to petition the government for redress of grievances—the same interest which is present at bar.

Further support for petitioners' argument that the regulations, properly construed, call for a hearing in the post blowout Santa Barbara Channel situation is seen from the fact that the regulations, in haec verba, call for hearings when the question of leasing new tracts is involved. (43 C.F.R. 3381.4; Pet. Appx. 35.) It is no answer to say that the regulation just mentioned has to do with pre-leasing, while at bar the situation is post leasing. As the Council on Environmental Quality pointed out (1st Annual Report, pg. 11), the decision to permit oil drilling in the Santa Barbara Channel was based primarily on the value of the development of the oil resources. "The commercial, recreation, esthetic, and ecological values . . . were largely ignored." With the happening of the blowout, and the knowledge which is available as a result thereof, there is no longer any reason to ignore these values in de-

termining what to do in the Channel in the future. This is especially so since the U. S. G. S. up to now, at least, has relied for its information on what the oil companies have supplied to it. The other interested parties—the public and the property owners affected—should now be heard. To shut the public out is a misreading of the tenor of the whole legislative and regulatory scheme.

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IN THE

Supreme Court of the United States

October Term, 1970
No. 695

ALVIN WEINGAND, JACK D. KISCH, REYNOLDS YATER, JINNIE HUGLIN, NORMAN SANDERS, MARGARET D. GREENWALD, ARTHUR DAYTON, LEWIS MOTTER SMITH, MRS. GEORGE M. SIDENBERG, JR., MRS. KENNETH PECK, ROBERT O. EASTON, CHARLES M. CAMPBELL, JR., KENNETH MILLAR, WILLIAM URE, JAMES BOTTOMS, FRED EISSLER, NORMAN S. NYCE, MRS. H. R. BENHAM, JR.,

Petitioners,

vs.

WALTER J. HICKEL, Secretary of the Interior; WILLIAM T. PECORA, Director United States Geological Survey, D. W. SOLANAS, Regional Supervisor, Oil and Gas Division, United States Geological Survey; LEE A. DUBRIDGE, Science Advisor to the President of the United States; JOHN S. STEINHART, Office of Science and Technology and Executive Secretary to the Special Panel on the Future of the Union Oil Lease; GULF OIL COMPANY; MOBIL OIL CORPORATION; TEXACO INC., UNION OIL CO.,

Respondents.

COUNTY OF SANTA BARBARA, a political subdivision of the State of California, and THE CITY OF SANTA BARBARA, a municipal corporation of the State of California,

Petitioners,

vs.

WALTER J. HICKEL, Secretary of the Interior, United States of America; D. W. SOLANAS, Regional Supervisor, Oil and Gas Division, United States Geological Survey; UNION OIL COMPANY OF CALIFORNIA, a California corporation; PAULEY PETROLEUM, a corporation; MOBIL OIL CORPORATION, a New York corporation; PHILLIPS PETROLEUM COMPANY, a corporation; WESTERN OFFSHORE DRILLING AND EXPLORATION COMPANY, a corporation; STANDARD OIL COMPANY, a corporation; HUMBLE OIL COMPANY, a corporation; PETER BAWDEN DRILLING, INC., a Delaware corporation; GULF OIL COMPANY, a

(Continued on next page)

Pennsylvania corporation; TEXACO INC., a Delaware corporation; and ATLANTIC-RICHFIELD OIL CORPORATION, a corporation;

Respondents.

COUNTY OF SANTA BARBARA, a political subdivision of the State of California, THE CITY OF SANTA BARBARA, a municipal corporation of the State of California; ALVIN WEINGAND; JACK D. KISCH; REYNOLDS YATER; JINNIE HUGLIN; NORMAN SANDERS; MARGARET D. GREENWALD; ARTHUR DAYTON; LEWIS MOTTER SMITH; MRS. GEORGE M. SIDENBERG, JR.; MRS. KENNETH PECK; ROBERT O. EASTON; CHARLES M. CAMPBELL, JR.; KENNETH MILLAR; WILLIAM URE; JAMES BOTTOMS; FRED EISSLER; NORMAN S. NYCE; MRS. H. R. BENHAM, JR.,

Petitioners,

vs.

ROBERT J. MALLEY, Los Angeles District Engineer, Corps of Engineers, UNION OIL COMPANY OF CALIFORNIA, a California corporation; MOBIL OIL CORPORATION, a New York corporation; PHILLIPS PETROLEUM COMPANY, a Delaware corporation; STANDARD OIL COMPANY OF CALIFORNIA, a California corporation; HUMBLE OIL AND REFINING COMPANY, a Delaware corporation; TEXACO, INC., a Delaware corporation; ATLANTIC-RICHFIELD COMPANY, a Pennsylvania corporation; GULF OIL COMPANY, a Pennsylvania corporation; PAULEY PETROLEUM, INC., a Delaware corporation; COLORADO OIL AND GAS CORPORATION, a Delaware corporation; MESA PETROLEUM CO., a Delaware corporation; McCULLOCH OIL CORPORATION OF CALIFORNIA, a Delaware corporation; J. M. HUBER CORPORATION, a New Jersey corporation; HUSKY OIL COMPANY OF DELAWARE, a Delaware corporation; SUN OIL COMPANY, a New Jersey corporation; SHELL OIL COMPANY, a Delaware corporation,

Respondents.

Answer to Motion to Defer Consideration of Petition for Writ of Certiorari.

Defendants Humble *et al.* oppose a motion to delay consideration of the petition for certiorari. Briefly stated, the problem is as follows:

There are pending in the United States District Court renewed motions for preliminary injunctions and motions to dismiss. The motions to dismiss assert, among other things, that under the applicable statutes and regulations, plaintiffs do not have the rights they assert by the complaints. The complaint asserts, as respects the Engineers, that the Engineers were obligated to hold a public hearing before issuing permits to drill wells under Outer Continental Shelf leases. The motion to dismiss says that this is wrong as a matter of law and does not state a claim. Comparable problems arise with respect to the complaints against the Department of the Interior. Those complaints do assert the unconstitutionality of the Outer Continental Shelf Act. But plaintiffs have treated them as also asserting that the Secretary of the Interior has not complied with that Act and applicable regulations in that he issued leases, and after issuing leases, authorized continued operations without a hearing.

These are in large part issues passed upon by the Court of Appeals which are now before this Court on the petitions for certiorari. Final decisions on these appeals will be the law of the case, and will be determinative in large part in the District Court. So long as the

application for certiorari is under submission, however, they are not final.

While that is the case, it is quite impossible to have any meaningful hearings in the District Court. Of necessity, it is bound by the appellate opinion, once it becomes final, and at this point can hardly do other than wait. We are concerned, therefore, that plaintiffs' proposed course of procedure will have the effect of creating a circular impasse. The District Court ought to wait for a final appellate decision before dealing with the motions now before it. If the District Court awaits an infinitely deferred ruling on certiorari, and this Court awaits action in the District Court, it is hard for us to see how anything can happen. For example, one of the propositions asserted in the petition for certiorari is that the Court of Appeals erred in determining that all constitutional questions were for the three-judge court. This Court is asked to overrule that determination. Can it be suggested that the three-judge court ought to proceed on the same constitutional questions, at the instance of plaintiffs, while plaintiffs here maintain that those questions ought to have been determined by the Court of Appeals?

We suggest that the cases before the Court on petition for certiorari present straightforward questions of statutory and regulatory construction, which have been resolved in the only possible way by the Court of Appeals. The applications for certiorari should be denied. If other questions arise in pending proceedings, they can be brought before this Court in the regular way. There is no point to further delay.

So that this Court can have something a little better than a series of ex parte descriptions of proceedings

the District Court, we attach as exhibits plaintiff's latest memorandum in the District Court and our response, which describes more fully the matters pending. The exchange is correct: our response was filed today.

Respectfully submitted,

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C. REX BOYD,
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Attorneys for Respondent Phillips Petroleum Company.

MUSICK, PEELER & GARRETT,
J. PATRICK WHALEY,
BRUCE A. BEVAN, JR.,

Attorneys for Respondent Sun Oil Company of California (as to Sun Oil, in County of Santa Barbara v. Malley only).

EXHIBIT 1.

Another Memorandum.

United States District Court, Central District of California.

County of Santa Barbara, et al., Plaintiffs, vs. Fred J. Russell, (Hickel) et al.,[1] Defendants. No. 69-636-ALS.

Alvin Weingand, et al., Plaintiffs, vs. Fred J. Russell, (Hickel) et al., Defendants. No. 69-1317-ALS.

County of Santa Barbara, et al., Plaintiffs, vs. Robert J. Malley, et al., Defendants. No. 69-1986-ALS.

This memorandum is intended 1) to augment the Memorandum filed on November 19, 1970; and, 2) to bring to the attention of Judges James M. Carter, Manuel L. Real, and Ray McNichols—particularly to Judge McNichols—in summary form, the motions in the above cases, presently pending—as well as the present position of the plaintiffs, with respect to these motions.

In addition to aiding the cause of the plaintiffs, we are hopeful that this memorandum will be helpful to all the judges of the 3-Judge Court—and, particularly to Judge McNichols, who has undertaken all the Santa Barbara cases—26 in number; and, who, in the three instant injunction cases is faced with "mountains" of papers—cases which have already been (albeit in a different context) to the Supreme Court of the United States, 396 U.S. 950, and to the Court of Appeals for he Ninth Circuit, Nos. 25049 and 25413;

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[1]Walter J. Hickel, heretofore the principal defendant herein, is no longer Secretary of Interior; the Acting Secretary is Fred J. Russell. Hence, our substituting his name for that of Secretary Hickel. See Rule 25(d)(1), Federal Rules of Civil Procedure.

and are presently back in the Supreme Court, on Petition for Writ of Certiorari, No. 695, this Term of Court.[2]

One of counsel for the non-government plaintiffs has given up his plans for an extended—or any—vacation beginning December 16, 1970 (as stated in our Memorandum of November 19, 1970)—this despite the lure of Waikiki. His commitments to the cause of the plaintiffs, professional and on principle, make it improvident for him to be unavailable, should this Court, or any of its Judges, be available to hold a hearing between December 16, 1970 and mid-January, 1971 (the dates of the heretofore planned vacation). Accordingly, he will remain on hand for a hearing at any time; and will take his vacation thereafter.

The motions presently pending and awaiting adjudication are:

1. In the *Russell* cases:

i. Defendants' Motions to Dismiss, filed in July and August, 1969;

ii. Plaintiffs' Motions for Preliminary Injunction, filed June 5, 1970;

iii. Plaintiffs' Motions for Production of Documents, filed July 1, 1970;

iv. Plaintiffs' Motions for Leave to Amend by Interlineation, filed July 1, 1970.

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[2]As to that proceeding, we have already submitted to the judges of this Court the pleadings in the Supreme Court. We are presently preparing, for filing in that Court, a Motion that the Supreme Court defer disposition of the Petition, to await action by this Court on the pending motions. We shall furnish the Judges of this Court with copies of that motion to defer when prepared.

2. In the *Malley* case:

i. Defendants' Motions to Dismiss, filed in October, November and December, 1969;

ii. Plaintiffs' Motion for Leave to Amend by Interlineation, filed July 2, 1970;

iii. Plaintiffs' Motion for Preliminary Injunction, filed July 17, 1970.

As to the motions in *Malley*, it is clear they must be decided by a one-Judge Court—now Judge McNichols—no three-Judge Court having been appointed since plaintiffs in that case are not seeking an injunction against the enforcement of an Act of Congress on the ground of repugnancy to the Constitution.

As to the motions in *Russell*, we understand that all parties are in agreement that two of them—the defendants' motions to dismiss and the plaintiffs' motion for preliminary injunction—must be decided by the three-Judge Court. As to the other two—the motions for production of documents and to amend by interlineation, it is our present view that these could—and perhaps should—at the same time as the motions in *Malley*, be heard by Judge McNichols, as a single judge. We now can see no strong reason for taking the time of Judges Carter and Real to listen to oral arguments on these latter two motions. These motions are on procedural matters, of some importance, of course, but not of substantive or critical import.

We suggest, accordingly—and request—that the *Malley* motions be heard by Judge McNichols, at a time, as soon as may be, convenient to Judge McNichols, and that the production and amend motions in *Russell* be set down for the same time.

(As to place, "California Mohammeds" will go to the mountains of Idaho; but, we suggest that, at this time of the year, Southern California's "sub-tropical" climate is to be preferred to the frigid chills of an Idaho fall or winter.)

(Should the 3-Judge Court, or any of its Judges, desire it, we shall be glad to arrange for a transcript of the oral argument to be made available to the Court, or to any of its Judges.)

Plaintiffs' counsel are presently ready for a hearing on all the pending motions; and we bespeak as early a hearing on them as may be.

Finally, if our suggestion that the two motions in *Russell* that may be heard by a single judge be heard by him, will result in any delay of the hearing on the motions in that case that must be determined by the three-judge court, we respectfully withdraw that suggestion.

Respectfully submitted,

GEORGE P. KADING,
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JOHN J. MITCHELL, JR.,
MARVIN LEVINE
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STANLEY T. TOMLINSON,
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CITY OF SANTA BARBARA
By Marvin Levine
A. L. WIRIN
FRED OKRAND
Attorneys for Non-Government
Plaintiffs

CERTIFICATE OF SERVICE BY MAIL

FRED OKRAND certifies that he is and was, at all times mentioned herein, an active member of the State Bar of California and not a party to the within action or proceeding; that his business address is 257 South Spring Street, Los Angeles, California 90012, and that on December 1, 1970 he served the within

ANOTHER MEMORANDUM

on the defendants by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in a United States Post Office facility regularly maintained by the Government of the United States at Los Angeles, California; that the names and addresses of the persons served, as shown on said envelopes, were as follows:

Robert L. Meyer, U. S. Attorney, Central District, 1100 U. S. Courthouse, 312 N. Spring Street, Los Angeles, California 90012.

Miles W. Newby, Jr., Esq., 3350 Wilshire Blvd., Los Angeles, California 90005.

O'Melveny & Myers, 611 West Sixth Street, Los Angeles, California 90017.

Theodore A. Robinson, Esq., Phillips Petroleum Company, 66 Bovet Road, San Mateo, California 94402.

Lawler, Felix & Hall, 800 Standard Oil Building, 605 West Olympic Boulevard, Los Angeles, California 90015.

McCutchen, Black, Verleger & Shea, 615 South Flower St., Suite 1111, Los Angeles, California 90017.

R. W. Curtis, Esq., 1801 Ave. of the Stars, Ste. 1402, Los Angeles, California 90067.

Nossaman, Waters, Scott, Krueger & Riordan, 455 South Figueroa Street, Los Angeles, California 90017.

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Ball, Hunt, Hart and Brown, 120 Linden Avenue, Long Beach, California 90802.

Lillick, McHose, Wheat, Adams & Charles, 611 West Sixth Street, Los Angeles, California 90017.

Poindexter & Lynch, 626 Wilshire Blvd., Suite 1100, Los Angeles, California 90017.

Schell and Delamer, 458 South Spring Street, Los Angeles, California 90013.

Executed on December 1, 1970 at Los Angeles, California.

Fred Okrand

EXHIBIT 2.

Memorandum Responding to "Another Memorandum" by Plaintiffs.

United States District Court, Central District of California.

County of Santa Barbara, et al., Plaintiffs, vs. Walter J. Hickel (Russell), et al., Defendants. No. 69-636-ALS.

Alvin Weingand, et al., Plaintiffs, vs. Walter J. Hickel (Russell), et al., Defendants. No. 69-1317-ALS.

County of Santa Barbara, et al., Plaintiffs, vs. Robert J. Malley, et al., Defendants. No. 69-1986-ALS.

This will supplement plaintiffs' memorandum summarizing the status of certain cases before this Court. To preserve clarity, we will use the captions including Hickel's name, with Russell in parenthesis thereafter.

The Santa Barbara Channel cases pending before this Honorable Court fall into two categories. On the one hand, there are the numerous damage actions filed against the four Platform A companies (Union, as operator, and Texaco, Gulf and Mobil), which are now being determined pursuant to stipulation before the Masters appointed by the Court. On the other hand, there are the three cases which are the subject of plaintiffs' "Another Memorandum". These are injunction, not damage, cases, and are not confined to companies involved in the Platform A spill—indeed, the principal defendants are others. These are the cases now under discussion.

These cases, *County of Santa Barbara v. Hickel (Russell)*, No. 69-636-ALS, and *County of Santa Barbara v. Robert J. Malley*, No. 69-1986-ALS, have at-

tempted to bring to a stop, on one procedural device or another, all oil operations on Federal lands, whether by companies involved in the Platform A spill or not, in the Santa Barbara Channel. *Weingand v. Hickel (Russell)*, No. 69-1317-ALS, is a similar case but brought only against the four Platform A partners. While we hesitate to add to the vast volume of paper already accumulated in these files, perhaps a further outline of the issues in these cases and their past history may also be of assistance.

First a matter of very general background. As is indicated in some detail in various memoranda in the file, oil has been produced in the waters adjacent to Santa Barbara County for a great many years. Thus, there are upwards of 200 wells operated on platforms by lessees of the State of California offshore of the County. In 1968, the United States sold leases on Outer Continental Shelf lands in the Santa Barbara Channel for upwards of $600 million. Humble, whom we represent, paid approximately $240 million for certain leases.

The unfortunate Platform A spill took place in January of 1969. Operations were suspended by the Secretary of the Interior for several months. Thereafter, they have proceeded subject to rigid restrictions. These cases followed.

Weingand was the first filed. Humble, and the other parties who join in this brief, are not involved in the *Weingand* case. However, again as a matter of background, it is necessary to touch on it briefly. *Weingand* was initially concerned with the DuBridge Report. After operations in the Channel were shut down, the President appointed a special panel headed by Dr.

Lee DuBridge, formerly President of California Institute of Technology, which reported that it was advisable to produce oil from the structure over which Platform A was situated, for the very practical reason that if oil field pressures were not relieved through production, more oil would escape into the ocean than if such production took place. *Weingand* was essentially an attempt to enjoin implementation of that decision, at least until a hearing had been held preceded by production to plaintiffs of whatever information the DuBridge Panel relied upon. A preliminary injunction was denied, implementation has proceeded, and it is hard to see what issue remains in connection with that complaint as originally filed.

The second case, *County of Santa Barbara v. Hickel (Russell)*, involves a two-count complaint. The first count asserts the theory that drilling in the Outer Continental Shelf is an "ultrahazardous activity", and draws the conclusion that the Secretary acted beyond his authority in issuing leases in the area. The second count asserts that the Outer Continental Shelf Act is unconstitutional, in that it does not provide for a hearing to surrounding landowners in advance of the development of oil in the area. On this ground, a three-judge court was requested and appointed. Plaintiffs tested this constitutional conclusion by moving for summary judgment, and losing. They also sought a preliminary injunction in this case against any oil operations in the Channel, a motion denied by Judge Stephens, and appealed unsuccessfully to the Court of Appeals for the Ninth Circuit on constitutional and other grounds. That court indicated that only the three-judge court should properly give such an injunction on con-

stitutional grounds, and rejected all non-constitutional grounds. Certiorari has been applied for.

Malley involves the Army Engineers. As the memoranda on file set forth at some length, the Secretary of the Interior generally runs O.C.S. oil operations. When a structure is to be installed, however, a permit is needed from the Engineers. In *Malley*, a hearing before the Army Engineers in advance of issuance of any permit was sought on the ground that the Constitution required that they be interpreted as having this meaning. The District Court denied a preliminary injunction, and the Court of Appeals affirmed, finding that the statutes and regulations did not require a hearing, and likewise, that the Constitution did not require such a construction of the statutes. Again, certiorari has been applied for.

Presently, there are pending the following motions (involving the following issues):

(1) *Motions to amend or alter the pleadings.*

In all three cases, plaintiffs seek to amend by interlineation, to state that in exercising their various responsibilities, the governmental agencies have failed to comply with the National Environmental Policy Act of 1969. Those motions are opposed on the following grounds:

(a) that amendments by interlineation are normally forbidden under the local rules (Local Rule 4(1)), and are singularly inappropriate in cases of significance, where it is highly important that some order be kept to the pleadings file;

(b) in that the pleadings, as amended, would make no sense—the effect would be to state that leases are invalid under statutes which were not adopted until two years after the leases were issued; and

(c) in that, in *Weingand*, and *County of Santa Barbara v. Hickel (Russell)*, the effect would be to introduce before the three-judge court a separate single-judge lawsuit, which does not require a three-judge court. Whether the Department of the Interior has complied with that National Environmental Policy Act has nothing to do with whether the O.C.S. Act is unconstitutional. The three-judge procedure is "a difficult tax" on the judicial system, and is not to be expanded. Three-judge jurisdiction of an independent non-constitutional issue may not be obtained by purporting to tie it to an unconnected claim. (*Calif. Water Service Co. v. City of Redding*, 304 U.S. 252, 255-56, 58 S. CT. 865, 866-67 (1938)).

It seems to us that the motions to amend must be decided by the three-judge court, which alone can determine if it is to be subject to this added burden.

(2) *Motions to dismiss.*

Motions to dismiss are pending in all cases. In the *Weingand* and *Hickel (Russell)* cases, motions to dismiss rest on absence of indispensable parties, and on the ground that in any event the complaints do not state a claim. Briefly, as to the indispensability of parties, the issue is that the suits affect the property interests of the United States. It is a lessor and has an interest in oil production. Such a party is indispensable in a suit to enjoin oil production, and since the United States cannot be sued, dismissal is appropriate.

In addition, it is urged that the complaints do not and cannot state a claim. Since the Outer Continental Shelf Act authorizes oil and gas leases, the first cause of action in *Hickel (Russell)* must fail: whether or not the drilling for oil in the Outer Continental Shelf

is "ultrahazardous", it is authorized by the statute and is within the Secretary's authority. Similarly, as the three-judge court found on the motions for summary judgment, there is nothing to the constitutional issues. To the extent that the *Weingand*, and *County of Santa Barbara v. Hickel (Russell)* cases assert any statutory or rule-created right to a hearing prior to oil development, the Court of Appeals held that there is none. Ergo, it would appear that *Hickel (Russell)* ought to be dismissed. *Malley* involves the claim that the Army Engineers are required to grant a hearing whenever the Engineers permit a well to be drilled or a structure installed: on the appeal from the denial of the preliminary injunction, the Court of Appeals held the contrary.

There is a problem, however, in scheduling an immediate hearing. Plaintiffs have asked for certiorari on the ruling of the Court of Appeals. Until those applications are acted on, the Court of Appeals' ruling is not final. Once final, it becomes the law of the case; until then, action would seem inappropriate.

(3) *Motions for preliminary injunction.*

A preliminary injunction is sought by plaintiffs in all cases. In *Weingand* and in *Hickel (Russell)*, the situation is complicated. It appears that all germane prayers have been abandoned. The following is the story:

(a) Originally, plaintiffs moved in both *Weingand* and *Hickel (Russell)* for a preliminary injunction forbidding the authorization by the Secretary of the Interior of the drilling of any wells in the Channel under the existing leases without first holding a public hearing of some sort. Both constitutional and non-

constitutional grounds were relied on. That motion was heard by a single judge. The injunction was denied. An appeal was taken to the Court of Appeals, which, as respects the non-constitutional ground, held that the statutes and regulations applicable do not require a public hearing (426 F.2d 164 (1970)). In affirming, the Court of Appeals described the merits saying that ". . . plaintiffs have here so related their irreparable damage contention to their asserted right to a hearing that a consideration of the merits cannot be avoided." (Id. at 168.) Again, it would seem that the decision of the Court of Appeals, when final, will be the law of the case on all non-constitutional grounds. The Court of Appeals declined to consider the constitutional grounds, on the basis that those were matters before the three-judge court and not properly before it.

Under date of June 4, 1970, plaintiffs then filed a motion for a preliminary injunction before the three-judge court. The motion asked that the Secretary be enjoined "from granting permits for the erection of any new oil-well platforms and authorizing any new oil operations in the Santa Barbara Channel without first according the plaintiffs a public hearing. . . ." The motion was made on the ground that the defendants' conduct abridges plaintiffs' right to due process, and on the ground that the O.C.S. Act and the regulations thereunder are repugnant to the due process clause of the Fifth Amendment.

They also moved for an injunction restraining the Secretary ". . . from making his decision in re-evaluating the procedure to be pursued in the future to insure maximum protection of Southern California waters and beaches from oil seepage in the Santa Barbara Channel, without first complying with Section

102(C) of the National Environmental Policy Act of 1969. . . ." This motion was made on the ground that ". . . the forthcoming decision as to the Santa Barbara Channel is a major Federal action significantly affecting the quality of the human environment. . . ." The claim that there was a pending decision was based on the affidavit of Fred Okrand to the effect that ". . . on or about February 24, 1970, Secretary of the Interior Walter J. Hickel publicly announced that in three to six months from that time, a decision would be made, after a thorough review of all data and testimony, as to the best procedure to be pursued in the future to insure maximum protection of Southern California waters and beaches from oil seepage in the Santa Barbara Channel."

Affidavits and fairly extended authorities were filed in response to that motion. Plaintiffs then filed a Reply Memorandum on or about August 26, 1970, which indicated that the injunction desired was something different from that originally sought. An injunction against the Secretary's "re-evaluating the procedure to be pursued in the future" was still sought. Apparently the prayer for an injunction against "granting permits for the erection of any new oil-well platforms and authorizing any new oil operations in the Santa Barbara Channel without first according to plaintiffs a public hearing . . ." was withdrawn: at least it is not included in the list of "the relief which plaintiffs seek and to which they feel entitled on their motion for a preliminary injunction" enumerated at pages 39-40 of their Reply Memorandum. For that they substituted the request "that the Secretary be enjoined from granting the Santa Ynez Unit application of defendants Humble

Oil & Refining Company . . . without first affording a public hearing thereon. . . ."

We have responded fully to that revised prayer: we could hardly leave it unattended. At the same time, we must add that it seems to us that the request is not properly before the Court at all. The complaint says nothing about the unit agreement, even as it would be interlined. The application for an injunction said nothing about enjoining the unit agreement. The affidavits filed show that the only effect of the unit agreement is to reduce the number of platforms and wells which are required in developing leases, since a unit agreement permits several leases to be developed as a single parcel. Without at this time attempting to re-argue the question fully, we submit that it cannot be permissible to debate enjoining approval of a unit under plaintiffs' "hearing" theory, under a complaint which says nothing about it, by virtue of the provisions of a statute which was not even enacted when the complaint was filed, which statute says nothing about granting hearings anyway in a lawsuit which does not name all the parties to the unit and which names others who are not parties. We add that the unit agreement has at this date received its full administrative process and approval, and at the present time, so far as we are aware, there is no administrative action pending to enjoin.

Much the same situation exists with respect to the various requests that an injunction be issued against the Secretary's proposed "reconsideration". The claim that there was such in the offing was based on a newspaper report. Dr. Pecora's affidavit indicates that nothing of the sort is pending in the Department. The six to eight months referred to in Mr. Okrand's affidavit

is long since passed. We do not believe it appropriate to enjoin a "reconsideration", which so far as we can discern, simply is not in process.

With much deference, therefore, we submit that there is in fact nothing presently pending which is in any state for a decision, so far as preliminary injunctions are concerned.

CONCLUSION

We think it unfortunate that all this procedural confusion has hampered the orderly presentation of the issues in this case. We suggest that in order to get the questions, which we assume both parties would like to see adjudicated, finally and satisfactorily disposed of, that the following procedures be followed:

(a) We would suggest that the motions to dismiss and the motions for preliminary injunctions on the constitutional grounds be argued before the three-judge court at a convenient date. It is our belief that the constitutional issues involved are essentially frivolous, and the sooner they are disposed of the better. We do not think that a real question exists as to whether the Outer Continental Shelf Act is valid. The three-judge court ruled that it was valid, on the motion for summary judgment, and we assume that the same conclusion would be dispositive of the constitutional grounds set forth in the complaints of *Weingand* and *Hickel (Russell)*. However, since the complaints will be up for dismissal on non-constitutional grounds as well as constitutional grounds, it would seem inappropriate to hold the hearing until there are final opinions in the appeals now before the Supreme Court on certiorari.

(b) As we understand the matter, plaintiffs are now principally interested in asserting that the National Environmental Policy Act of 1969 requires a hearing before development of the leases go forward in some degree. In the past, the application for injunction was hung on the installation of particular platforms, then it was phrased in terms of any platforms, then it was phrased in terms of the approval of a unit agreement (which, of all the possible acts relating to the development of the Channel, is one of which plaintiffs certainly should not complain, and in any event is now (*sic*) now "pending"), and it was also hung on a hypothetical "reconsideration" by the Secretary, which on the record before this Court apparently does not exist. If, as it now seems to be the case, plaintiffs' principal interest arises under the National Environmental Policy Act, we would very respectfully suggest that they first determine for themselves what the stage of development is which they contend is a "major Federal action" within the Act—the installation of an additional well, an additional platform, the approval of a plan of operations, or anything else, and then prepare an appropriate complaint, and if they wish, an appropriate application for preliminary injunction. The complaint should be new—it has nothing to do with any of the claims now asserted. At that point, it should then be feasible to respond in an orderly way.

It is possible that a conference of counsel with the Court might be helpful in this connection. In this, and in any other respect, we are, of course, at the Court's disposal. We have no interest in delay: necessarily, our clients are making very large expenditures in developing their leases for which they paid so much, and under which they have large obligations. But those

same very serious expenditures and significant obligations preclude acceptance of a chaotic approach to these cases.

Dated: December 18, 1970.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL.

State of California, County of Los Angeles—ss.

Dolores Cook, being first duly sworn, deposes and says: that her business address is 615 South Flower Street, Los Angeles, California 90017; that she is a citizen of the United States over the age of 18 years employed in the County of Los Angeles, California, and not a party to this cause; that on December 18, 1970, she served a copy of the document to which this proof of service is attached upon each of the persons named below by depositing the same, enclosed in sealed envelopes addressed respectively as shown below with postage thereon fully prepaid, in a mail box, mail chute or like facility regularly maintained by the Government of the United States at 615 South Flower Street, Los Angeles, California 90017; that the names and addresses of the persons served, as shown on said envelopes, were as follows:

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Subscribed and sworn to before me this 18th day of December, 1970.

Barbara Reed
Notary Public in and for said County and State.
BARBARA REED

[Seal]

IN THE

Supreme Court of the United States

October Term, 1970
No. 695

COUNTY OF SANTA BARBARA, *et al.*,

Petitioners,

vs.

ROBERT J. MALLEY, *et al.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply to Answer to Motion to Defer Consideration of Petition for Writ of Certiorari.

In their Answer to Motion to Defer Consideration of Petition for Writ of Certiorari, respondents Humble, *et al.* have attached (pp. 7-20) a copy of their latest memorandum in the District Court. Without discussing the entire memorandum, we deem it appropriate to comment on the statement made by respondents (p. 15) that "the unit agreement has at this date (December 18, 1970) received its *full* administrative process and approval, and at the present time, so far as we are aware, there is no administrative action to enjoin." (emphasis added).

Respondents are mistaken:

1. The Santa Ynez Unit application has not received final administrative approval;

2. There are presently pending before the Department of the Interior two applications for platforms; one, Platform "C," by Union Oil Company; the other, Platform "Henry," by Sun Oil Co.;

3. There are presently pending before the Corps of Engineers four applications by Humble Oil Co. for drilling permits.

Respectfully submitted,

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